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## Japan, Regulatory Compliance, and the Wisdom of Extraterritorial Social Controls

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# Japan, Regulatory Compliance, and the Wisdom of Extraterritorial Social Controls

By WILLIAM S. LAUFER\* and IWAO TAKA\*\*

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## I. INTRODUCTION

Over the past decade, the United States has engaged in a series of formal and informal initiatives to encourage Japan to use its antitrust laws to abolish bid rigging, attack powerful cartels, provide access to trade associations and *keiretsu*, and dismantle fixed trade barriers.<sup>1</sup> These initiatives hinge on a perception that Japan has unfairly and unjustifiably inflicted damage on the United States economy.<sup>2</sup> On numerous occasions, U.S. representatives have threatened economic sanctions and sternly warned Japan that U.S. antimonopoly laws would be used extraterritorially to achieve equity in international trade and commerce.<sup>3</sup> These aggressive overtures reflect a frustration that Japan already has the law and legal infrastructure to address recurrent antimonopolistic acts and other trade practices that violate antitrust law, but has chosen not to enforce relevant laws and effectively use the resources of administrative agencies.<sup>4</sup> The frustration is fueled, at least in part, by the sense that the negotiations during the Structural Impediments Initiative (SII), the Group of Seven (G-7)

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1. See LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES (Gary R. Saxonhouse & Kozo Yamamura eds., 1986).

2. See, e.g., H.R. 1051, 102d Cong., 2d Sess. 1 (1992) ("Over the past three decades, Japan has pursued industrial targeting policies that have effectively dismantled portions of the U.S. economy. Japan used industrial targeting to eliminate or substantially weaken the American auto, consumer electronics, color television, and semiconductor industries, leaving in its wake severely depressed communities suffering from joblessness and other social problems. There are those who see this, not as a fair competition, but as part of a larger, premeditated strategy to use economic aggression to enhance Japan's economic power at the expense of the United States.").

3. The efforts and initiatives of U.S. trade representatives to reform the Japanese regulatory policy will be discussed in the second part of this article. These efforts and initiatives, it is argued, represent both formal and informal extraterritorial social controls. See *infra* Part II.A. Extraterritorial social controls are specific attempts (e.g., suggestions, demands, and threats) by one nation-state to influence and counteract normative deviance in a foreign nation-state. Specific attention will be paid to the extraterritorial social control of Japan's regulatory policies and enforcement strategies.

4. See, e.g., *Government-Business Mission to Japan Focuses on Urging Anti-Cartel Enforcement*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1561, at 522 (Apr. 16, 1992) (stating that law in Japan is adequate, but its commitment to enforcement is deficient).

Meeting, various summit meetings, and the recent Trade Framework talks made the U.S. position clear: unfair competition and trade practices must end.<sup>5</sup>

Unfortunately, U.S. trade representatives have had little success in forcing extraterritorial reform. There are commentators who claim that the transition from a Liberal Democratic Party hegemony to a responsive democracy may be underway in Japan, but even with several notable antitrust prosecutions, there is scant evidence of lasting antimonopoly reform.<sup>6</sup> What accounts for the relative failure of U.S.-Japan reform initiatives? The failure of the U.S. extraterritorial antitrust reform efforts, it will be argued, reflects a fundamental misconception of Japan's socio-cultural, socio-legal, and regulatory traditions.<sup>7</sup> In misjudging and ignoring long-standing and deeply held traditions, the U.S. has attempted to export a rule-based vision of law and regulatory enforcement that is fundamentally at odds with prevailing Japanese regulatory practice and enforcement strategies.<sup>8</sup>

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5. A series of reports that chronicled the efforts of the U.S.-Japan Working Group on the Structural Impediments Initiative revealed a common understanding of bilateral goals and objectives. See U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE (SII), INTERIM REPORT AND ASSESSMENT, Apr. 5, 1990 (For example, the Japan Working Group agreed that the JFTC would take the following actions: (1) resort to more formal actions; (2) ensure greater transparency; (3) increase its budgetary allocation for investigations; and (4) increase the number of criminal prosecutions). For similar statements of intention, see U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE (SII), JOINT REPORT, June 28, 1990; U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE (SII), FIRST ANNUAL REPORT, May 22, 1991; U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE (SII), STRUCTURAL IMPEDIMENTS INITIATIVE JOINT STATEMENT FOR THE RECORD, Mar. 13, 1992; U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE (SII), SECOND ANNUAL REPORT, July 30, 1992. For a review of the SII, see Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436 (1991); Abbott B. Lipsky, Jr., *Current Developments in Japanese Competition Law: Antimonopoly Act Enforcement Guidelines Resulting from the Structural Impediments Initiative*, 60 ANTITRUST L.J. 279 (1991).

6. For a discussion of existing antimonopoly law and law enforcement in Japan, see HIROSHI ODA, *JAPANESE LAW* (1992); MITSUO MATSHUSHITA & THOMAS J. SCHOENBAUM, *JAPANESE INTERNATIONAL TRADE AND INVESTMENT LAW* (1989); ELLIOT J. HAHN, *JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM* (1984).

7. See *infra* Part IV.B-C.

8. This argument is far from new. The difference between the U.S. and Japanese regulatory culture has been the topic of numerous commentaries, including an informative symposium in the Cornell International Law Journal. See Frank K. Upham, *Introduction* to 22 CORNELL INT'L L.J. 375 (1989). For a summary of the cultural perspective, see John O. Haley, *Luck, Law, Culture and Trade: The Intractability of United States-Japan Trade Conflict*, 22 CORNELL INT'L L.J. 403, 416 (1989) [hereinafter Haley, *Luck, Law, Culture, and Trade*] ("American trade policy has been predominately a matter of coercive legal regulation while the Japanese approach has been one of informal, consensual restriction.");

Most important, extraterritorial initiatives have overlooked powerful normative controls, already in place in Japan's regulatory culture, that may support corporate and industry compliance with existing laws.<sup>9</sup> In the first section of this article, we consider the effort by the United States to assert extraterritorial social control (ESC) in Japan. The focus is on the incongruence between U.S. and Japanese regulatory policy and practice. In the second part, we present a model of Japanese socio-cultural tradition that underwrites the effectiveness of consensual governance. Finally, in the third part, we suggest the need for a different approach to U.S.-initiated extraterritorial control and propose strengthening extraterritorial initiatives that promote corporate and industrial self-regulation.<sup>10</sup>

## II. REGULATORY ENFORCEMENT AND EXTRATERRITORIAL SOCIAL CONTROLS

One view of Western metaregulatory theory, in the ideal, assumes that organizational compliance is a function of a regulator's capacity and willingness to impose sanctions.<sup>11</sup> The potential for graduated regulatory responses empowers an agency to engage in both passive and active deterrence. Pyramid regulatory enforcement, as proposed by Ayres and Braithwaite, pushes regulation down and maximizes compliance and cooperation.<sup>12</sup> Deterrence is maximized where a tit-for-tat strategy is used; where there is access to a hierarchical range of

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John O. Haley, *Japanese Antitrust Enforcement: Implications for United States Trade*, 18 N. KY. L. REV. 335 (1991) [hereinafter Haley, *Japanese Antitrust Enforcement*]. For a fascinating account of Japanese legal culture, see MASAJI CHIBA, *LEGAL PLURALISM: TOWARD A GENERAL THEORY OF JAPANESE LEGAL CULTURE* (1989).

9. This observation reflects the central argument of this article, which stands in sharp contrast to prior discussions of legal and socio-cultural differences. We argue in favor of using existing informal controls and normative constraints, embedded in the regulatory culture of Japan to promote compliance with existing antimonopoly law. Other commentators have argued, almost without exception, for a strengthening of law enforcement through the erection of formal social controls. See, e.g., John O. Haley, *Administrative Guidance versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in *LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES* 107, 114 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986) ("The availability and certainty of sanctions for failure to comply with government policies is therefore the single most important factor in determining the outcome of informal law enforcement.").

10. See *infra* Part IV.B.

11. See NEAL SHOVER ET AL., *ENFORCEMENT OR NEGOTIATION: CONSTRUCTING A REGULATORY BUREAUCRACY* (1986); JOHN BRAITHWAITE, *TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY* (1985).

12. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); John Braithwaite, *Enforced Self Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1982).

sanctions and interventions; and where the height and shape of the sanction function (i.e., the height of the pyramid) is consistent with the desired compliance and regulatory environment.<sup>13</sup> The theory is entirely intuitive: compliance is a function of the capacity for regulatory escalation and the potency of sanctions. The range and nature of regulatory sanctions and strategies determine successful regulation.

In actual practice, the notion of responsive regulation is complicated by a host of structural variables that mediate the effectiveness of regulatory strategies and sanctions, (e.g., a firm's economic strength).<sup>14</sup> Responsive regulation is further determined by discretionary agency decisionmaking, the extent to which prevailing law requires active or passive regulation, and existing market regulation.<sup>15</sup> Even with a long list of qualifications, however, one must accept the idea that regulatory compliance in the United States is maximized when an agency has an explicit enforcement strategy and where sanctions can be escalated or de-escalated in relation to an organization's or industry's responsiveness. Tied to this notion of hierarchically escalating sanctions is the idea that, depending on the industry, prevailing customs, and market forces, self-regulation should be replaced with enforced self-regulation and the imposition of increasingly more significant legal or administrative interventions where noncompliance continues. In theory and practice, self-regulation in the context of cooperative mediation is preferred until agencies must resort to the threat of the "benign big gun."<sup>16</sup>

Models of enforcement pyramids capture the power of combining hierarchical strategies and sanctions. Successful integration of these strategies and sanctions, however, require rule-based administrative and regulatory environments. Pyramid models presuppose reliance on law, rules, and sanctions to deter individual and illegal activity. Rule-based approaches lose effectiveness in regulatory environments

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13. AYRES & BRAITHWAITE, *supra* note 12, at 40-41.

14. PETER C. YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 47-49 (1991); STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

15. PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978); JAY A. SIGLER, *INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPELSION* (1988).

16. AYRES & BRAITHWAITE, *supra* note 12, at 40. None of this is to suggest that the prevailing paradigm in the West is an exclusive reliance on law and rule-based deterrence. As commentators have noted, most administrative regulation in the U.S. remains informal. See Haley, *supra* note 9, at 112-14. Negotiation and compromise are still the primary tools of regulators. The difference between Japan and the U.S., however, is the role of law, sanctions, and coercive authority. It is with repeated noncompliance that significant differences appear.

that are characteristically informal, mediator-centered, and consensus driven. After all, escalating threats and tit-for-tat sanctions are not the every day ingredients of consensus-based dispute resolution. As many commentators have noted, Japan's administrative agencies rarely resort to the use of coercive authority.<sup>17</sup> Agencies most often ask for consent from those affected by administrative policies. Consensus-driven negotiations between trade ministries and industrial associations, for example, lead to the formulation of policy and informal enforcement strategies.<sup>18</sup> Law and law enforcement accordingly "function in large measure as consensus-building processes rather than avenues for command and coercion."<sup>19</sup> The result is a consensual governance that reflects administrative authority without the threat of coercive power and without resort to legal sanctions. According to one commentator, Japanese industrial policy is the enshrinement of bargaining and negotiation.<sup>20</sup>

Consensual governance, without the threat of escalating sanctions, is achieved in part through administrative guidance (AG) (*gyōsei shidō*).<sup>21</sup> AG is a form of consensual persuasion practiced by governmental agencies since the beginning of the Meiji era (1868-1912).<sup>22</sup> There are at least three types of AG: (1) guidance authorized by statute which allows for the issuance of recommendations (*kankoku*), (2) guidance issued under regulatory statutes that may provide more formal mechanisms such as orders or license requirements, and (3) guidance not authorized by statute, but rather under the law establishing a particular ministry. This third form of AG pro-

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17. See, e.g., FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 207 (1987) ("Informality allows the control of social interaction, whether by private groups, the bureaucracy, or the judiciary, to be particularistic so that consensus can form the basis of dispute resolution.").

18. For a recent discussion of consensual policy formulation, see Steven M. Spaeth, *Industrial Policy, Continuing Surveillance, and Raised Eyebrows: A Comparison of Informality in Administrative Procedure in Japan and the United States*, 20 OHIO N.U. L. REV. 931 (1994).

19. JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 198 (1991). Commentators, such as Frank Upham and John O. Haley, paint idealized portraits of two different visions of law and authority in the United States and Japan.

20. Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 941 (1984).

21. See John O. Haley, *The Oil Cartel Cases: The End of an Era*, 15 L. JAPAN 1 (1982); Wolfgang Pape, *Gyosei Shido and the Antimonopoly Law*, 15 L. JAPAN 12 (1982).

22. MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN* 59-61 (1993).

vides regulatory guidance to ministries, allows for the promotion and support of industries, and harmonizes conflicting interests.<sup>23</sup>

Notwithstanding persistent allegations of antitrust violations by the United States, AG has been effective in ensuring regulatory compliance, most often without resort to legal measures.<sup>24</sup> At least four reasons have been offered that may account for this.<sup>25</sup> First, there is a strong appreciation in Japan that the interests of the government override those of any individual, organization, or industry. Second, AG reflects generally accepted organization and industry willingness to build consensus (*ringi-sei*) with governmental ministries. Third, the reciprocal nature of favors in Japan promotes strongly dependent industry-ministry relations. Finally, AG is far more flexible than formal legal mechanisms.<sup>26</sup> With AG, the focus is squarely on achieving government-industry harmony through consensual administrative management.<sup>27</sup>

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23. See Young, *supra* note 20, at 940 ("Bureaucrats consult with involved parties before regulation both to build a consensus and, on occasion, to elicit the cooperation of the regulated parties. Administrative guidance issued without such consultation may meet with disobedience and, in rare instances, litigation.").

24. For a discussion of the effectiveness of Japan's industrial regulatory policy, see Haley, *Japanese Antitrust Enforcement*, *supra* note 8, at 356 ("Japanese reliance on informal, social controls to regulate social and economic behavior may also seem peculiar to American eyes. Nonetheless, Japanese law enforcement authorities, including Japanese FTC officials, testify to their effectiveness."); Mitsuo Matsushita, *The Legal Framework of Japanese Industrial Policy*, 58 B.Y.U. L. REV. 541, 544 (1987); HAHN, *supra* note 6, at 117 ("[AG's] uniqueness is due to the high degree of compliance obtained by a ministry of the Japanese government through its requests to industry even though its legal authority to act is frequently questionable at best."). Cf. Iyori Hiroshi, *Antitrust and Industrial Policy in Japan: Competition and Cooperation*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY, *supra* note 1, at 56, 60 ("The government-business relationship in Japan has resulted in restriction rather than promotion of competition . . ."); Haley, *supra* note 9, at 121 ("[A]dministrative guidance is too pliable an instrument of enforcement to compel industry cooperation."). An excellent account of the limits of AG, contrasting the Sumitomo Metals incident and the Oil Cartel cases, is found in Frank K. Upham, *The Legal Framework of Japan's Declining Industries Policies: The Problem of Transparency in Administrative Processes*, 27 HARV. INT'L L.J. 425 (1986).

25. See Lawrence Repeta, *The Limits of Administrative Authority in Japan: The Oil Cartel Criminal Cases and the Reaction of MITI and the FTC*, 15 L. JAPAN 24 (1982).

26. See Yoriaki Narita, *Administrative Guidance*, 2 L. JAPAN 45 (1968); Kenji Sanekata, *Administrative Guidance and the Antimonopoly Law—Another View of the Oil Cartel Criminal Decisions*, 15 L. JAPAN 95 (1982).

27. See Pape, *supra* note 21, at 12; Young, *supra* note 20, at 84; Takashi Wakiyama, *The Nature and Tools of Japan's Industrial Policy*, 27 HARV. INT'L L.J. 467 (1986); Mitsuo Matsushita, *The Legal Framework of Trade and Investment in Japan*, 27 HARV. INT'L L.J. 361 (1986). These authorities point out weaknesses in AG including: A lack of transparency; the fact that AG is less powerful now that many large, global corporations have become increasingly independent; compliance with AG is voluntary; too much deference is given to AG by the courts; the flexibility of AG leads to discretionary regulation.



### A. *Extraterritorial Social Controls (ESCs)*

For many years commentators have noted the stark differences between the regulatory efforts, mechanisms, and processes in the United States and Japan.<sup>28</sup> In discussing the extraterritorial application of U.S. law, scholars have obsessed over issues of jurisdiction, comity, and sovereignty. This is so although the United States has rarely exercised extraterritorial jurisdiction successfully.<sup>29</sup> At the same time, scant attention has been paid to the extraterritorial assertion of social control. Extraterritorial control initiatives may be traced to the mid-1960s when the United States began exerting pressure on Japan to vacate trade and investment restrictions, and thus allow access to its markets.<sup>30</sup> Throughout the 1970s and 1980s, the focus was on the efficacy of voluntary export restraints.<sup>31</sup> Beginning with the Reagan administration, the U.S. engaged in a concerted campaign to change Japanese regulatory policy through a wide range of extraterritorial social controls (ESCs)—extraterritorial warnings, pressure, demands, and threats.<sup>32</sup> ESCs may be defined as specific efforts or initiatives by one nation-state to define, respond to, and assert control over the regulatory procedures and practices of another nation-state. ESCs appear as unilateral or direct controls (i.e., initiatives from one nation-state directed at another nation-state).<sup>33</sup> Alternatively, ESCs appear as a variation of third party social control—an effort by a party (United States) to influence or manipulate the actions of a second party (a relevant ministry) through a third party (threats of legal action against a Japanese corporation).<sup>34</sup> With few exceptions, ESCs are

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28. Legal scholars have justifiably cautioned against forming stereotypic images that draw distinctions that are more apparent than real. See UPHAM, *supra* note 17.

29. See A.V. LOWE, *EXTRATERRITORIAL JURISDICTION* (1983); JAMES B. TOWNSEND, *EXTRATERRITORIAL ANTITRUST: THE SHERMAN ANTITRUST ACT AND U.S. BUSINESS ABROAD* (1979).

30. See LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY, *supra* note 1. See also Upham, *supra* note 8, at 375. Upham notes that the first U.S.-Japan trade dispute occurred in 1856, when Townsend Harris demanded that Japan open its markets.

31. Voluntary export restraints (VERs) bear some resemblance to ESCs that call for third party control. With VERs, the Japanese government mediates the interests of the U.S. in relation to the affected industry in Japan. For a discussion of VERs, see Mitsuo Matsushita, *A Japanese View of U.S. Trade Laws*, 8 NW. J. INT'L L. & BUS. 29 (1987).

32. It should be noted that the conceptualization of ESCs originates in this article.

33. Unilateral control refers to the singular direction of control. This is in contrast to Horwitz's conceptualization of unilateral control as an aggressive or confrontational response in an escalation of social control. See ALAN V. HORWITZ, *THE LOGIC OF SOCIAL CONTROL* 127 (1990).

34. JACK P. GIBBS, *NORMS, DEVIANCE, AND SOCIAL CONTROL: CONCEPTUAL MATTERS* (1981); JACK P. GIBBS, *SOCIAL CONTROL: VIEWS FROM THE SOCIAL SCIENCES*

designed as coercive leverage to force administrative agencies, such as Japan's Fair Trade Commission (JFTC) and Ministry of International Trade and Industry (MITI), to promote the transparency of AG, shift allocation of regulatory resources, and increase the reliance on law, law enforcement, and legal sanctions as means of assuring regulatory compliance. ESCs squarely target both internal and external policymaking.<sup>35</sup> ESCs range in formality and intensity from suggestions for regulatory reform or law enforcement to threats of legal sanctions. The most formal, albeit rarely used, ESC is an extraterritorial legal action and sanction. ESCs also vary in frequency and duration from threats of economic sanctions associated with short deadlines to long-standing pressure to engage in substantive law reform. Examples of the range of ESCs appear in Table 1.

(1982). The elements of ESC differ from the orthodox styles of social control described by Black and Horwitz. ESCs attack the regulatory non-conformity of a nation-state through the use of a wide range of informal and formal initiatives. The differences with other styles of social control, in terms of harm, liability, goal, and solution, are contrasted below.

Elements of Styles of Social Control

	PENAL	COMPENSATORY	CONCILIATORY	THERAPEUTIC	EXTRATERRITORIAL
HARM	Value	Material	Relational	Personality	Non-conformance
LIABILITY	Individual	Group	Shared	None	Nation-state
GOAL	Retribution	Settlement	Reconciliation	Normality	Conformity
SOLUTION	Punishment	Payment	Negotiation	Treatment	Coercion to Force Reform

35. See Keith Hawkins & John M. Thomas, *Making Policy in Regulatory Bureaucracies*, in *MAKING REGULATORY POLICY* (Keith Hawkins & John M. Thomas eds., 1989). Hawkins and Thomas, in referring to the work of Colin Diver, make a critical distinction between external policymaking (i.e., rulemaking that governs the conduct of regulated industries and methods of law enforcement) and internal policymaking (i.e., allocation of agency resources and rules for regulatory discretion). See also Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

**Table 1**  
**Range of ESCs**

SUGGESTIONS	PRESSURE	DEMANDS	THREATS	LEGAL ACTION
U.S. suggests that Japan make revisions to Antimonopoly Law by abolishing exceptional cases and exclusions. <sup>36</sup>	Strongly worded requests by the U.S. for JFTC investigation of insurance <i>keiretsu</i> . <sup>37</sup>	U.S. demands that Japan raise fines for the violation of antitrust laws, as part of a "20 point" demand for antitrust reform. <sup>38</sup> U.S. demand for investigation of glass market by JFTC. <sup>39</sup>	U.S. threatens to invoke unilateral sanctions for failure to enact additional market opening procedures and increase antimonopoly enforcement. <sup>40</sup>	United States suit against Japanese construction companies for bid rigging, price fixing and swindling. <sup>41</sup>

### 1. Context for ESCs

Extraterritorial application of U.S. antitrust law provides a context and premise for ESCs.<sup>42</sup> After the landmark decision of *United States v. Aluminum Co. of America (Alcoa)*,<sup>43</sup> American antitrust laws have been extended, albeit rarely, to those non-American corporations that have a substantial and intended effect on American trade and commerce.<sup>44</sup> Agreements made outside the United States that re-

36. *United States Presses Japan to End Antimonopoly Law Exclusions*, Int'l Bus. Daily (BNA), Apr. 22, 1992, available in LEXIS, News Library, BNAIBD File; *U.S. Seeks Tighter Steps Against Bid Rigging*, Jiji Press Ticker Service, Aug. 8, 1994, available in LEXIS, World Library, Jiji File.

37. *Japan Denies JFTC Probe Into Insurance 'Keiretsu,' Grouping*, Japan Economic Newswire, Oct. 2, 1994, available in LEXIS, World Library, JEN File.

38. *U.S. Making a 20-point Demand for Structural Changes by Japan*, Int'l Bus. Daily (BNA), Mar. 11, 1992, available in LEXIS, News Library, IBDBNA File.

39. *Japan, U.S. to Continue Glass Trade Talks*, Japan Economic Newswire, Aug. 31, 1994, available in LEXIS, World Library, JEN File.

40. *Hosokawa Urges U.S. to Withhold Sanctions*, Jiji Press Ticker Service, Feb. 18, 1994, available in LEXIS, World Library, Jiji File.

41. *53 Japanese Construction Firms Face Justice Department Charges of Bid Rigging*, 67 Antitrust & Trade Reg. Rep. (BNA) No. 1681, at 350 (Sept. 22, 1994).

42. See Thomas W. Dunfee & Aryeh S. Friedman, *The Extraterritorial Application of United States Antitrust Laws: A Proposal for An Interim Solution*, 45 OHIO ST. L.J. 883 (1984) (arguing that extraterritorial assertion of antitrust laws must balance the political and economic interests of both forum and affected nations); Note, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355 (1984).

43. 148 F.2d 416 (2d Cir. 1945). See John M. Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT. L. 558 (1967).

44. For a general review of the reach of antitrust laws, see LOWE, *supra* note 29. For an outstanding review of extraterritoriality, tracing the law from *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) to *Alcoa* and *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976), *remanded*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd* 749 F.2d

strain trade within its borders, according to the court in *Alcoa*, have the same effect as like agreements entered into in the United States. Over the last several decades, the "intended effects" test has been limited by considerations of comity as well as fairness. Most courts now apply some variation of a "jurisdictional rule of reason" standard.<sup>45</sup> Such a standard balances U.S. interests in exercising jurisdiction against the interests of the foreign nation-state.<sup>46</sup> Notably, the recent success of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) may affect the application of this standard, as well as Department of Justice policy regarding extraterritorial use of law.<sup>47</sup>

There are no comparable or analogous standards for the application of informal ESCs. United States trade representatives do not have to balance domestic trade interests with those of Japan when encouraging, pressuring for, or demanding increased vigilance in anti-trust enforcement. Rules of reason and fairness are not required. The

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1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985), see A.D. NEALE & M.L. STEPHENS, *INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION* (1988).

45. See, e.g., *Timberlane*, 549 F.2d at 597; *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). For an excellent treatment of the rule of reason test, see Seung Wha Chang, *Extraterritorial Application of U.S. Antitrust Laws to Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts within the Pacific Community*, 16 HASTINGS INT'L & COMP. L. REV. 295 (1993); James G. Park, *Extraterritorial Impact of the United States Antitrust Laws and Commercial Bribery Considerations*, 1 DICK. J. INT'L L. 105 (1982); John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350 (1983); Eleanor M. Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, 19 N.Y.U. J. INT'L L. & POL. 565 (1987). Cf. *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982); *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980).

46. Courts consider the "degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is [an] explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." *Timberlane*, 549 F.2d at 614. For a discussion of the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA) and Antitrust Guidelines of the Justice Department, see Chang, *supra* note 45, at 306-08. For an outstanding review of Justice Department policy, see Lori B. Morgan & Helaine S. Rosenbaum, *U.S. Department of Justice Antitrust Enforcement Policy*, 34 HARV. INT'L L.J. 192 (1993).

47. See BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *COMPETITION, COMPETITION POLICY, AND THE GATT*, (World Bank Policy Research Working Paper No. 1228, 1993); ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993). For a discussion of Japan's membership in and adherence to the GATT, see MATSUSHITA & SCHOENBAUM, *supra* note 6, at 9-18; MATSUSHITA, *supra* note 22; Michael W. Lochmann, *The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of United States Antitrust Laws*, 27 HARV. INT'L L.J. 99 (1986).

prerequisite for resort to ESCs may range from political self-presentation or posturing to genuine concerns over trade inequities and anti-trust violations. In focusing exclusively on the theoretical problems of extraterritorial legal action, and the rise of defensive blocking statutes, commentators have generally overlooked the wisdom of engaging in a persistent course of extraterritorial threats and demands. In doing so, commentators have neglected the most common of all extraterritorial social controls, informal ESCs such as threats of trade sanctions and concerted pressure to abide by the strictures of existing law.<sup>48</sup>

## 2. *Precedent for the Effectiveness of ESCs*

If the context and premise for ESCs may be found in the extraterritorial application of antitrust law, the precedent for ESC use may be traced to the history of reactive reform in Japan following significant external pressure from the United States and Europe.<sup>49</sup> Both Japanese and U.S. commentators have noted that foreign pressure (*gaiatsu*) has been a proven catalyst for change of the status quo (*genjo iji*) since the turn of the century.<sup>50</sup> As a former MITI vice minister observed, nearly all of post-war Japan's liberalization policies were implemented in response to foreign pressure.<sup>51</sup> In the early 1960s, trade liberalization, and over the next the decade, capital liberalization, were undertaken reluctantly by industry and government because of foreign pressure. U.S. pressure prompted financial and communications liberalization in the 1980s.<sup>52</sup> With such a history of effectiveness, ESCs seem to be a logical, wise catalyst for regulatory reform.

A favorable prognosis for the application of ESCs has been reinforced by the success of recent bilateral negotiations. Agreements between the U.S. and Japan to open markets in rice, telecommunications, medical technology, flat glass, and insurance have followed the Framework Agreement signed in July 1993.<sup>53</sup> Ja-

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48. See John S. Magney, *U.S. Extends Reach of Antitrust Enforcement*, 11 INT'L FIN. L. REV. 18 (1992) (arguing that the recent change in antitrust enforcement policy at the Department of Justice is unlikely to result in much litigation).

49. See, e.g., KENNETH B. PYLE, *THE JAPANESE QUESTION: POWER AND PURPOSE IN A NEW ERA* 111-14 (1992).

50. Ryutaro Komiya & Motoshige, *Japan's International Trade and Trade Policy, 1955-1984*, in *THE POLITICAL ECONOMY OF JAPAN* 210 (T. Inoguchi & D.I. Okimoto eds., 1988).

51. *Id.* at 111-12.

52. See Hiroshi, *supra* note 24, at 56-59.

53. *U.S. and Japan Announce Economic Framework Agreement*, 4 U.S. DEPT. STATE DISPATCH 29 (1993).

pan's apparent willingness to undertake significant macroeconomic reforms raises expectations about the possibility of curing antitrust practices.<sup>54</sup> Any optimism concerning the utility of ESCs, however, should be tempered by a consideration of four key variables that will likely determine the effectiveness of any extraterritorial control initiative: (1) *consistency of application*, i.e., whether the ESCs will increase in formality with application (hierarchical application) or be applied inconsistently over time (non-strategic application), (2) *formality*, i.e., the degree of formality, ranging from informal suggestions for reform to formal initiations of legal action or economic sanctions, (3) *relational distance*, i.e., the strength, intensity, and quality of the relationship between both nation-states, and (4) *receptivity of regulatory environment*, i.e., the extent to which the ESCs can prompt meaningful regulatory change given the existing social controls imbedded in the regulatory culture. Each of these variables will be discussed at some length in the balance of this article, with an emphasis on the receptivity of Japan's regulatory environment.<sup>55</sup>

### B. Escalating ESCs and Consensual Governance

Much like the idealized model of Braithwaite's pyramids, ESCs may appear as a series of escalating warnings and threats. The U.S. strategy with Japan has been simple minded: use extant law and law enforcement in policing suspect industries and questionable trade practices or face an escalation of extraterritorial controls. Unlike the logic of enforcement and sanction pyramids, however, ESCs have not been applied progressively and hierarchically.<sup>56</sup> There is little consis-

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54. See, e.g., Dan F. Henderson, *Access to the Japanese Market: Some Aspects of Foreign Exchange Controls and Banking Law*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY, *supra* note 1, at 131.

55. In addition to these variables, the prognosis for lasting regulatory change appears to turn on certain assumptions concerning the effect of social change on Japan. There are two alternative hypotheses: (1) That the Japanese attach insubstantial importance to formal control and, thus, will not be affected by legalistic, rule-based initiatives, and (2) that differences in the socio-cultural environment of Japan and the U.S. are decreasing, as the former becomes increasingly Westernized, leaving open the possibility that formal controls will be effective. See J. Mark Ramseyer, *Japanese Antitrust Enforcement After the Oil Embargo*, 31 AM. J. COMP. L. 395, 426-28 (1983). As Ramseyer has noted, neither of these hypotheses is entirely adequate. Fortunately, the arguments in this article do not require either hypothesis. Rather, we focus on the prognosis for lasting regulatory reform following extraterritorial social controls. To maximize the effect of ESCs, we conclude that existing proactive and reactive constraints in Japan should be enhanced by extraterritorial initiatives, rather than replaced by formal, rule-based controls.

56. It is not as if U.S. trade representatives have followed a logical and consistent course of ESCs, moving from suggestions for reform to active pressure, demands for ac-

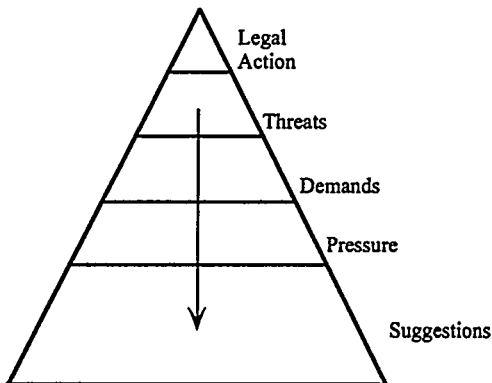
tency in the application of ESCs due to: (1) the ease at which informal ESCs are applied by the United States, (2) the absence of any standards or guidelines concerning the use and escalation of ESCs, (3) the mercurial receptivity of Japan to antitrust reform, and (4) the changes in U.S. trade policies toward Japan over the course of three presidential administrations.

### 1. Responses to ESCs

There is a certain irony in both the message and the messenger with ESCs. The U.S. has used a coercive rule-based approach to achieve greater reliance on law and formal controls in Japan's consensus-based regulatory environment. The message and messenger appear out of place in a country that is founded on informal conflict resolution and mediation. This is not to suggest, however, that AG is never supported by legal sanctions.<sup>57</sup> This is also not to suggest that Japan has failed to respond to ESCs. Over the last five years, a number of ministries have adopted new and more stringent enforcement guidelines,<sup>58</sup> raided trading firms suspected of bid rigging,<sup>59</sup> in-

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tion, and threats of legal and economic sanctions. A consistent and hierarchical progression of ESCs would appear much like Braithwaite's pyramid of sanctions.



Compliance is maximized, in the ideal, where there is an escalating program of pressure, demands, and threats. See AYRES & BRAITHWAITE, *supra* note 12, at 35-53.

57. See Young, *supra* note 20, at 923.

58. See, e.g., *The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices*, (Japan Fair Trade Commission), July 11, 1991 (on file with authors). For supportive commentary, see *Japan Commission Strengthens Guidelines on Administrative Advice By Bureaucrats*, Int'l Bus. & Fin. Daily (BNA), available in LEXIS, News Library, BNAIBF File (July 7, 1994); *JFTC Adopts Antimonopoly Act Guideline Governing Competition and Venture Capital*, 67 Antitrust & Trade Reg. Rep. (BNA) No. 1679, at 290 (Sept. 1, 1994).

creased the examination and enforcement staff,<sup>60</sup> strengthened the JFTC's capacity to monitor the transactions among *keiretsu* firms,<sup>61</sup> re-examined the Japanese Company Law,<sup>62</sup> and imposed fines on companies in an apparent response to ESCs.<sup>63</sup>

In fact, in direct response to strong pressure from the United States several years ago, the JFTC filed the first criminal charges for price fixing since the famous oil cartel cases twenty-two years ago.<sup>64</sup> The charges were described by JFTC officials as a sign of a new and more restrictive stance toward monopolistic practices. To both the naive and hopeful it appeared that AG would be supplemented by the more frequent filing of criminal charges, reflecting a realization in Japan of a need for what has been termed "western style" or "rule-centered" legalism.<sup>65</sup> This need was apparently underscored by concerns

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59. *JFTC Raids Trading Companies for Bid Rigging*, Int'l Trade Daily (BNA), Sept. 8, 1994.

60. *JFTC Moves Into New Headquarters, Seeks Expanded Funding and Staffing*, 67 Antitrust & Trade Reg. Rep. (BNA) No. 1679, at 289 (Sept. 1, 1994); *Kantor Calls Japan Market Reform Disappointing, Unlikely to Spur Talks*, 11 Int'l Trade Rep. (BNA) No. 13, at 488 (Mar. 30, 1994).

61. There are three pre-war *zaibatsu* related *keiretsu* (the big financial combines: Mitsubishi, and Sumitomo), three bank-related *keiretsu* (Fuji [Fuyo], Daiichikangyo, and Sanwa), and the several independent corporate groups such as Toyota, Nissan, Matsushita, Toshiba, Shin Nihon Seitetsu, and Hitachi. The first six groups are called "horizontal *keiretsu*" and the latter "vertical *keiretsu*." With the horizontal type, the presidents and chairmen of the same group periodically exchange their opinions about general matters, but they do not have common strategic decision-making meetings. The vertical groups, on the other hand, are likely to hold a hierarchical structure among group corporations. See the following two articles: Negishi Akira, *Kigyo Keiretsu no Ho Kozo* [Legal Structure of Industrial Groups], in *KIGYO KEIRETSU TO HO* [INDUSTRIAL GROUPS AND LAW] 1-150 (Negishi Akira et al. eds., 1990); OKUMURA HIROSHI, *SHIN NIHON NO ROKUDAI KIGYO SHUDAN* [THE SIX LARGEST INDUSTRIAL GROUPS IN JAPAN] (1983); GENDAI NIHON NO KIGYO GROUP [INDUSTRIAL GROUPS IN MODERN JAPAN] (Sakamoto Kazuichi & Shimotani Masahiro eds., 1987).

62. U.S.-JAPAN WORKING GROUP ON SII, *Second Annual Report of the U.S.-Japan Working Group on the Structural Impediments Initiative (SII)* II36-II61 (July 30, 1992).

63. *Japanese Court Metes out Fines to Firms Rigging Masked Seal Bids*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1645, at 793 (Dec. 23, 1993).

64. *Japan, in Rare Move, Charges Price-Fixing of Food Wrap*, N.Y. TIMES, Nov. 7, 1991, at D2. In the Oil Cartel Cases of 1973, twelve of the fourteen wholesale oil refining corporations operating in Japan were charged with violating Article 3 of the Anti-Monopoly Law by fixing and controlling oil prices and production volume. Article 3 prohibits unreasonable restraint of trade, such as any agreement to mutually restrict or conduct business so as to fix, maintain, or enhance prices. See Haley, *supra* note 8.

65. See THE INTERNATIONALIZATION OF JAPAN (Glenn D. Hook & Michael A. Weiner eds., 1992).



in Japan about the appearance of legitimacy as their economy and markets became increasingly open to foreign trade and investment.<sup>66</sup>

## 2. Resistance to ESCs

ESCs have done little to alter the government-industry allegiance to AG, consensus driven regulation, and informal conflict resolution. No matter how impressive the outcome of these initiatives appear, it is only fair to conclude that ESCs have failed to prompt lasting regulatory reform.<sup>67</sup> This conclusion is shared by U.S. trade representatives who routinely express their frustration with the slow progress of trade reform.<sup>68</sup> Many reasons have been offered for this failure. Professor Ramseyer, for example, has argued that formal and informal antitrust law enforcement have given way to domestic electoral politics.<sup>69</sup> The ruling party, according to Ramseyer, offers lawful cartels through statutory exemptions to the antimonopoly laws in exchange for political

66. See Ramseyer, *supra* note 55, at 428-29.

67. Empirical evidence of this claim may be found in the criminal convictions under the Antimonopoly Law. The first criminal penalty, and third conviction since the Oil Cartel Cases, was obtained on December 14, 1993. See *Japanese Court Metes out Fines*, *supra* note 63, at 793. Further evidence of the failure of ESCs to effect significant change appears in the numbers of investigations by the JFTC:

	1986	1987	1988	1989	1990	1991	1992
TOTAL NUMBER OF INVESTIGATIONS	226	194	180	270	254	241	227
BRINGING FORWARD	91	78	62	85	101	74	91
NEW INVESTIGATIONS	135	116	118	185	153	167	136
CONDUCTS	148	132	95	169	180	150	173
ACTIONS TAKEN	129	118	87	153	164	141	131
DISCONTINUANCES	19	14	8	16	16	9	42
CARRYING FORWARD	78	62	85	101	74	91	54

*Kosei Torihiki Iinkai Nenji Hokoku Heisei 3 Nendo* [1991 Annual Report of The Japanese Fair Trade Commission: White Paper on Antimonopoly], The Japan Fair Trade Commission 16 (1991); *Kosei Torihiki Iinkai Nenji Hokoku Heisei 5 Nendo* [1993 Annual Report of the Japanese Fair Trade Commission: White Paper of Antimonopoly], The Japan Fair Trade Commission 17 (1993). Notably, on January 15, 1993, the Antimonopoly Law was revised raising the maximum penalty from ¥5 million to ¥100 million. *Heisa Shijo Hihan wa Osamaruka?* [Will Criticism of Closed Market End?], *NIHON KEIZAI SHINBUN*, Dec. 27, 1992, at 17.

68. See, e.g., Jonathan D. Richards, *Japan Fair Trade Commission Guidelines Concerning Distribution Systems and Business Practices: An Illustration of Why Antitrust Law Is a Weak Solution to U.S. Trade Problems with Japan*, 1993 WIS. L. REV. 921.

69. J. Mark Ramseyer, *The Antitrust Pork Barrel in Japan*, *ANTITRUST*, Summer 1992, at 40.

contributions.<sup>70</sup> A more frequent explanation is that the problems of trade more generally, and of antitrust law enforcement in particular, stem from distinct differences in Japanese and U.S. legal culture.<sup>71</sup>

Consistent with this cultural explanation, we suggest that the U.S. has attempted, under the guise of ESCs, to export a rule-based vision of regulatory compliance and enforcement that underestimates the role of consensus and mediation in Japanese administrative regulation.<sup>72</sup> In doing so, the U.S. has far over-estimated its ability to implement, through inconsistent extraterritorial efforts, lasting regulatory reform.<sup>73</sup> In the next part, we will suggest that this over-estimation stems from a misconception of the complex system of institutional social controls (described in the next part as concentric circles), as well as social cognitions that serve as a foundation for administrative guidance and consensual regulation. Our contribution to the ongoing debate over extraterritorial initiatives is the conclusion that Japan's socio-cultural tradition is underwritten by strong informal social controls that, with extraterritorial support, will effectively ensure regulatory compliance without the introduction of a western style antitrust enforcement agenda.<sup>74</sup>

As will become increasingly clear, the regulation of trade and commerce in Japan is inextricably connected to the socio-cultural environment and existing social controls.<sup>75</sup> The same may be said of the reliance on informal mediation and consensus building rather than formal rule-based regulation. The design of U.S. trade policy should

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70. Cf. Harry First, *Response: Selling Antitrust in Japan*, ANTITRUST, Spring 1992, at 34.

71. See Haley, *Luck, Law, Culture, and Trade*, *supra* note 8, at 404 ("Behind both the monthly trade figures and the public quarrel lie profound differences in the two societies, institutional and cultural environments, which influence both economic and political behavior. Pivotal are the differences in the shared values, attitudes and expectations toward law and the state—in other words, their legal cultures—that shape and concomitantly are shaped by the institutional arrangements for social ordering.") See also CHIBA, *supra* note 8.

72. It is not surprising that the nature and character of the Japanese regulatory environment may have been misjudged. Japanese culture and social structure are still the objects of academic debate by Western scholars, policy makers, and government officials. See Robert J. Smith, *Culture as Explanation: Neither All Nor Nothing*, 22 CORNELL INT'L L.J. 425 (1989). As noted earlier, however, it is surprising that U.S. trade policy promotes the exportation of formal social controls to a society that has relied almost entirely on third party mediation, consensus-driven policy, and informal social controls.

73. Cf. First, *supra* note 70, at 34.

74. See *infra* Part IV.A.

75. See ASPECTS OF SOCIAL CHANGE IN MODERN JAPAN (Ronald P. Dore ed., 1967); KAZUKO TSURUMI, SOCIAL CHANGE AND THE INDIVIDUAL (1970).

consider the strong normative influence found in Japan's socio-cultural environment.<sup>76</sup>

### III. THE NORMATIVE INFLUENCE OF CONCENTRIC CIRCLES

Consistent with Confucian theology, individuals and organizations in Japan tend to conceive of their social environment as having a centrifugal order, characteristic of a water ring.<sup>77</sup> Commentators have called this symbolic pattern a framework of concentric circles.<sup>78</sup> Individuals, groups, and organizations function in the realm of the following four concentric circles: family, fellow, Japan, and the world.<sup>79</sup> Each circle has its ethics, customs, norms, and codes of conduct. We will argue that concentric circles are the single most significant loci of normative constraint or social control in Japan.<sup>80</sup>

Concentric circles exert proactive and reactive control over individual and corporate agents.<sup>81</sup> Proactive social control is found in the circle's collective commitment to long term reciprocity; the effort to balance and counterbalance debts and benefits; the exchange of gifts, information, and services within a circle; the practice of cross-shareholding; the reciprocal trading networks that typify the horizontal *keiretsu*; the symbiotic relations between and among businesses, polit-

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76. See Haley, *Japanese Antitrust Enforcement*, *supra* note 8, at 335.

77. Many commentators consider Confucianism to be the most influential value system in Japan. Abegglen and Stalk, for example, have noted that: "The Confucian ethic, with its emphasis on respect for rank and age, has provided much of the value system" to Japanese corporations. JAMES C. ABEGLLEN & GEORGE STALK, JR., *KAISHA, THE JAPANESE CORPORATION* 198 (1985). Others have also credited Confucianism with the economic development of the western Pacific Rim. See MICHIO MORISHIMA, *WHY HAS JAPAN 'SUCCEEDED'? WESTERN TECHNOLOGY AND THE JAPANESE ETHOS* (1982); Il-Gon Kim, *Application of Confucian Ethics to Modern Economy: A Way to Give Life to the Cultural of Family Groupism*, in *GLOBALIZATION AND THE ETHICS OF ECONOMY* 169 (1990). See also Iwao Taka, *Business Ethics: A Japanese View*, in *BUSINESS ETHICS: JAPAN AND THE GLOBAL ECONOMY* (Thomas W. Dunfee & Yukimasa Nagayasu eds., 1993).

78. DOI TAKEO, *AMAE NO KOZO* [STRUCTURE OF "AMAE" ("PSYCHOLOGICAL DEPENDENCE")] (1971); KYOGOKU JUNICHI, *NIHON NO SEIJI* [POLITICS OF JAPAN] 191-94 (1983).

79. See Taka, *supra* note 77.

80. This argument leads to the conclusion in the second part that, to the extent that the U.S. engages in extraterritorial initiatives, these efforts should have the effect of strengthening corporate self-regulation, as well as AG. Given the potency of informal social controls in Japan, fostering self-regulation and administrative oversight is the preferred initiative for lasting regulatory reform.

81. Cf. NAKANE CHIE, *TATE SHAKAI NO NINGEN KANKEI* [HUMAN RELATIONS OF VERTICAL SOCIETY] 1 (1967) (discussing the normative effects of "frames").

ical communities, and governmental agencies; and the inhibiting effect of reputational damage or threat of damage.<sup>82</sup>

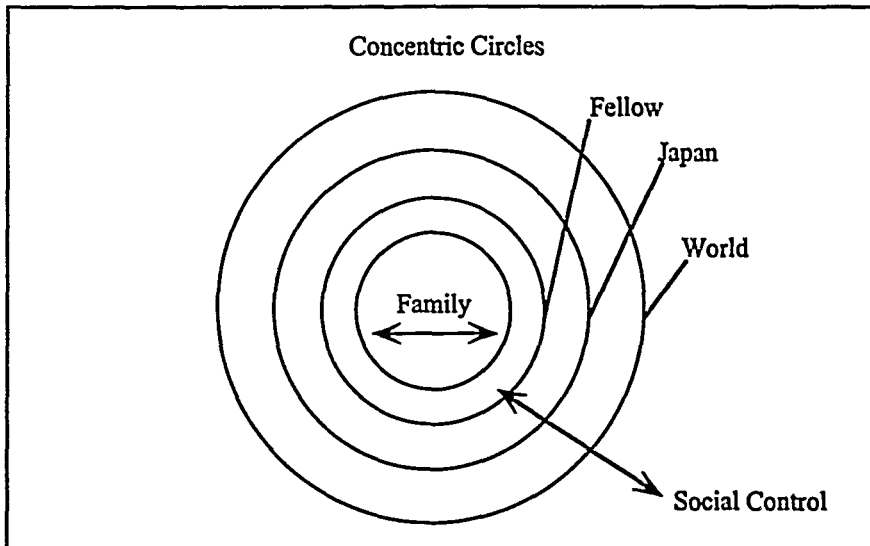
These commitments, efforts, practices, and relations exert proactive social control in at least three directions.<sup>83</sup> First, inner circles are the objects of significant normative influence from those within the circles. Reciprocal dealings and the promotion of what Professor Nakane has called a "total group consciousness" ensure normative order within one's circle.<sup>84</sup> In addition, the social distance between and among members of the same concentric circle is minimized so as to enhance group allegiance, loyalty, and solidarity. Second, outside circles exert significant influence on inside circles. The fellow circle, for example, is constrained by its interactions with the Japan and world circles. Third, when a new configuration within a circle is established, membership immediately begins to discourage circle constituents from engaging in norm-violative action. In short, the proactive normative influence of concentric circles extends bi-directionally across circles and across members.<sup>85</sup>

82. See *infra* notes 178 to 179 and accompanying text.

83. See NAKANE, *supra* note 81, at 9-11. Nakane discusses the need to strengthen group ties and bonds to make the "group element tougher." This may be accomplished in two ways: "One is to influence the members within the frame in such a way that they have a feeling of 'one-ness'; the second method is to create an internal organization which will tie the individuals in the group to each other and then to strengthen this organization." *Id.* at 9.

84. *Id.* at 10.

85.



Reactive social control, derived from models of conciliatory control, responds to deviance that has emerged within concentric circles.<sup>86</sup> When normative violations occur, a reactive social control from within and outside circle membership prompts mediation, conciliation, acceptance of responsibility, conflict resolution, and pressure to inhibit further offenses. Reactive social controls are inextricably tied to social hierarchies found in concentric circles.<sup>87</sup>

In the next several sections, we will consider the ingredients and effects of concentric circles in some detail, beginning with the cognitive norms of the individual agent.<sup>88</sup>

## A. *Cognitive Norms*

### 1. *Individual as Cognitive Agent*

The family circle reflects the primacy of family relationships and household structure (*ie* and *uchi*).<sup>89</sup> Central to the notion of the family circle is the relationship between parent and child.<sup>90</sup> This axial relationship is characterized by maternal benevolence as well as strong feelings of dependence by children on their parents.<sup>91</sup> The most important of all virtues in the family circle is filial piety.<sup>92</sup> The significance of piety reflects an overriding sense of obligation, indebtedness, and gratitude to parents.<sup>93</sup> With this sense of filial piety comes an

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86. For an excellent discussion of conciliatory social control, see HORWITZ, *supra* note 33, at 65 ("The parties involved in conciliatory control work together or with the aid of third parties to negotiate a mutually agreeable outcome. Solutions are obtained through mutual bargaining between the parties involved, not coerced through imposed sanctions.").

87. See *infra* Part III.C.

88. For a summary of the effects of social control, see Table 3 on page 525.

89. See NAKANE, *supra* note 81, at 5 ("[H]uman relationships within this household group are thought of as more important than all other human relationships."); see also JOY HENDRY, UNDERSTANDING JAPANESE SOCIETY 21-37 (1987); RICHARD K. BEARDSLEY ET AL., VILLAGE JAPAN (1959). For an excellent review of the effects of the household system see Kawamura Nozomu, *The Transition of the Household System in Japan's Modernization*, in CONSTRUCTS FOR UNDERSTANDING JAPAN 202-27 (Yoshio Sugimoto & Ross E. Murer eds., 1989); MURAKAMI YASUSUKE ET AL., BUNMEI TOSHITO NO IE SHAKAI [THE IE SOCIETY AS CIVILIZATION] (1979).

90. The relationship between a mother and her child is central in this circle. The mother accepts practically all of her child's behavior, while the child is entirely dependent.

91. See EDWIN O. REISCHAUER, THE JAPANESE TODAY: CHANGE AND CONTINUITY (1988); TADASHI FUKUTAKE, THE JAPANESE SOCIAL STRUCTURE: ITS EVALUATION IN THE MODERN CENTURY (Ronald P. Dore ed., 1981).

92. Cf. MITSUYUKI MASATSUGU, THE MODERN SAMURAI SOCIETY: DUTY AND DEPENDENCE IN CONTEMPORARY JAPAN (1982).

93. See GEORGE A. DEVOS, SOCIALIZATION FOR ACHIEVEMENT: ESSAYS ON THE CULTURAL PSYCHOLOGY OF THE JAPANESE (1973).

unquestioning deference to the decisions of the head of the family.<sup>94</sup> To ensure and preserve harmonious unity, familial conflict is resolved by the designated head of the family.<sup>95</sup>

The fellow circle includes friends, colleagues, and distant relatives. It is also composed of superiors as well as colleagues from the workplace. In this circle, material and spiritual "credits" and "debits" are balanced.<sup>96</sup> If a person provides a benefit for members of this circle, other circle members will owe a debt that should be repaid as a favor.<sup>97</sup> Upon receipt of a favor, a person will also inherit a debt that must be repaid in time.<sup>98</sup> The focus is on long-term exchange and reciprocity.<sup>99</sup> Unlike the family circle, the fellow circle encourages an equilibrium in favors owed and received. When there is a large imbalance in favors owed, a person will feel shame and face criticism.<sup>100</sup>

The Japan circle is characterized as a "wide society." Social differences and status distinctions are often reinforced here. Feeling estranged from those who are neither acquaintances nor peers, the importance of self-presentation is minimized. Even so, most Japanese feel a strong sense of identity or affinity with their group and therefore avoid actions that damage the group's reputation.<sup>101</sup> Although members of this circle are strangers, a common cultural background ensures an appreciation of and commitment to the notion of long-term reciprocity. In this respect, this circle differs from the world circle.

94. *Id.* at 28-29.

95. See DOI, *supra* note 78, at 38-43; NAKANE, *supra* note 81, at 13 ("In the ideal traditional household in Japan, for example, opinions of the members of the household should always be held unanimously regardless of the issue, and this normally meant that all members accepted the opinion of the household head, without even discussing the issue.").

96. FUKUTAKE, *supra* note 91, at 25.

97. For a fascinating extension of the culture of reciprocity in Japan, see Harumi Befu, *A Theory of Social Exchange as Applied to Japan*, in CONSTRUCTS FOR UNDERSTANDING JAPAN 39-66 (Yoshio Sugimoto & Ross E. Mouer eds., 1989) (discussing exchange transactions between and among individuals, entities without physical existence, corporate bodies, and society). For a general treatment of reciprocity, see Alvin W. Gouldner, *The Norm of Reciprocity*, 25 AM. SOC. REV. 161 (1960).

98. The norm of reciprocity reflects a general ethical principle that is supported by "customary rules of exchange" and "strategies of exchange." These rules guide what is considered appropriate and strategic reciprocation. See Befu, *supra* note 97, at 43.

99. See ROBERT J. SMITH, *JAPANESE SOCIETY: TRADITION, SELF AND THE SOCIAL ORDER* (1983).

100. See RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE* (1946).

101. See SMITH, *supra* note 99.

An international society surrounds the three concentric circles. This circle represents the world. Most Japanese consider the world circle to be turbulent (*ukiyo*) and a threat to the integrity of the inner circles.<sup>102</sup> Those who are averse to risk tend to shield the inner circles from the world. The world circle is welcomed, however, by those who place a great value on opportunity and advancement.<sup>103</sup>

## 2. Corporation as Cognitive Agent

Aggregates of individuals, such as corporations, also tend to interpret their social environment in terms of concentric circles. The complex socio-cultural environment of a corporation or business organization may be classified into the four concentric circles: quasi-family, fellow, Japan, and the world. A corporation has a quasi-family circle that typically consists of business partners (e.g., parent, sister, or affiliated companies).<sup>104</sup> In this circle, traditional familial relations foster employee relations and corporate alliances that often resemble the social bonds found in a parent-child relationship.<sup>105</sup> Mutual trust and shared expectations characterize these long-term business relationships.<sup>106</sup> In the fellow circle, a corporation interacts with its banks, fellow traders, affiliated firms, employees, and long-term customers.<sup>107</sup> Relations between assemblers and their suppliers within vertical *keiretsu*<sup>108</sup> are found within this circle.<sup>109</sup> In the case of horizontal *keiretsu*<sup>110</sup> (e.g., the Mitsubishi, Mitsui, Sumitomo, Dai Ichi Kangyo, Fuyo, and Sanwa groups); the core member corporations also

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102. See FUKUTAKE, *supra* note 91, at 49.

103. See NAKANE, *supra* note 81.

104. Core companies of "vertical *keiretsu*" like the Toyota, Hitachi, or Matsushita groups are excellent examples of the quasi-family circle. See Nozomu, *supra* note 89.

105. See NIHON NO KIGYO [JAPANESE CORPORATIONS] 131-58 (Imai Kenichi & Komiya Ryutaro eds. 1989); W. Mark Fruin, *The Firm As a Family and the Family As a Firm in Japan*, 5 J. FAM. HIST. 1 (1980). See also FUKUTAKE, *supra* note 91, at 147. Nakane has noted that "[t]hrough it is often said that the traditional family institution (*ie*) has disappeared, the concept of the *ie* still persists in modern contexts. A company is conceived as an *ie*, all its employees qualifying as members of the household, with the employer at its head. Again this 'family' envelops the employee's personal family; it 'engages' him 'totally' (*marugakae* in Japanese)." NAKANE, *supra* note 81, at 7-8.

106. W. CARL KESTER, JAPANESE TAKEOVERS: THE GLOBAL CONTEST FOR CORPORATE CONTROL 62-67 (1991).

107. See W. MARK FRUIN, THE JAPANESE ENTERPRISE SYSTEM: COMPETITIVE STRATEGIES AND CORPORATE STRUCTURES (1992).

108. See *supra* note 61.

109. Michael Gerlach, *Business Alliances and the Strategy of the Japanese Firm*, 30 CAL. MGMT. REV. 162 (1987).

110. See *supra* note 61.

belong to this fellow circle.<sup>111</sup> When members of a corporation belong to outside associations like *Nihon Jidosha Kogyo Kai* (Japanese Auto Manufacturers Association), *Keidanren* (Japanese Federation of Economic Organizations),<sup>112</sup> or *Keizai Doyukai* (Japanese Association of Corporate Executives), these associations are included in the fellow circle as well. It is not unusual for the government to be part of the fellow circle of a powerful, well-positioned corporation. As with individuals, the fellow circle of a corporation is characterized by a commitment to long-term reciprocal dealings. If the corporation does not offer benefits that are sufficient to counterbalance debts, then it risks damaging its business relations. If the corporation, however, can successfully balance benefits and debts, or maintain a surplus of favors, it will receive preferential treatment by other agents in the fellow circle.

The Japan circle is characterized by the principle of free competition. Competitors, unrelated corporations, individual stockholders, and consumers are found in this circle. Even with free competition and increasing alienation among "unrelated" or "unaffiliated" corporations it is still relatively rare for corporations in the Japan circle to engage in unethical or illegal acts.<sup>113</sup> Member corporations in the same quasi-family and fellow circles most often exert effective social control.

The world circle, in contrast, is far less controlled. This circle is a forum where relations among corporations become increasingly attenuated. Corporations are less concerned about self-presentation, reputation, and reciprocity. Corporations in this circle resort to the legal system when and where significant business conflicts arise that cannot

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111. For instance, consider the interrelations among the companies in the big six horizontal *keiretsu*. There are between 44 (Fuyo) and 20 (Sumitomo) subsidiaries and affiliated corporations including banking, insurance, construction, textile, chemical, steel, electric, shipbuilding, automotive, and shipping partners. See Maruyama Yoshinari, *The Big Six Horizontal Keiretsu*, 28 JAPAN Q. 186 (1992). In addition to these affiliated companies, each *keiretsu* has established an executive club designed to foster and promote group solidarity. Beyond this role, executive clubs mediate conflicts between group member companies and provide a forum for the adjudication of controversies. See Ely Razin, *Are the Keiretsu Anticompetitive? Look to the Law*, 18 N.C. J. INT'L L. & COM. REG. 351 (1993).

112. The *Keidanren* was established in 1946. As of December 1990, it was composed of 121 association and 939 corporate members. The main purpose of *Keidanren* is to find practical solutions to economic problems and to contribute to the sound development of the economies of Japan and of the world. The present Chairman of *Keidanren* is Gaishi Hiraiwa (Chairman of The Tokyo Electric Power). See, e.g., *Financial Keiretsu Strengthen Solidarity*, TOKYO BUS. TODAY, Feb. 1991, at 26.

113. See William S. Laufer & Alison Cohen, *Corporate Crime and Corporate Sanctions in Japan*, 12 BUS. CONTEMP. WORLD 123 (1992).



be informally resolved. As with individuals, the world circle is also viewed as turbulent and, at times, chaotic. This, it has been argued, prompts contradictions in corporate attitudes and behavior. For example, corporations hope to exclude foreign business corporations that do not share a commitment to long-term reciprocity. But this is far from easy to accomplish, given the significant interest in and demand for foreign technologies, products, and services.<sup>114</sup>

In summary, the normative environment of concentric circles exerts significant influence on both individual and corporate actors. As Table 2 suggests, the quality of this normative constraint or control often diminishes as relationships among the circle constituents become increasingly distant and abstract.

**Table 2**

	LEVEL OF CIRCLE	SOCIAL CONTROL
INDIVIDUAL	Family	Strong feelings of dependency and indebtedness to parents; filial piety; resolution of conflict by designated head of family; subordination of interests
	Fellow	Long-term reciprocity; balancing of debts and credits
	Japan	Sense of identity with common cultural background
	World	
CORPORATION	Quasi-Family	Parent company asserts control over subsidiaries; responsibility of parent company for actions of subsidiaries
	Fellow	Long-term reciprocity; balancing of debts and credits
	Japan	Principle of free competition
	World	

In addition to revealing the influence of cognitive norms, the framework of concentric circles also provides a context for the normative effect of two critically important business-related practices:

114. When Sony or Kyocera, for example, faced difficulties entering the Japanese market, they tried to succeed in the American and international markets. Once successful, they were immediately held in high regard by large Japanese companies. This demonstrates Japanese corporate attitudes towards success. Iwao Taka, *Sengo Nihon no Kigyoka Seishin (Ue)* [*The Spirit of Japanese Entrepreneurship After World War II (1)*], 42 REITAKU U. J. 185-213 (1986); Iwao Taka, *Sengo Nihon no Kigyoka Seishin (Shita)* [*The Spirit of Japanese Entrepreneurship After World War II (2)*], 43 REITAKU U. J. 205-33 (1986).

reciprocal relations in the business community and the "triumvirate" of the political community.<sup>115</sup> The former includes *keiretsu* and the practice of cross-shareholding. The latter considers AG and the more significant triangular relationship among business leaders, politicians, and bureaucrats.

### ***B. Reciprocal Business Relations***

Japanese corporations, regardless of size, hope to develop close long-term relations in the fellow circle through the active exchange of favors.<sup>116</sup> The logic for exchanging favors is grounded in the widely held belief that business opportunities will undoubtedly increase once long-term reciprocal relationships have been established.<sup>117</sup> Many business practices in Japan recognize the desirability of inclusion within the fellow circle. Examples include giving gifts, offering entertainment, relaxing policies concerning the return of goods,<sup>118</sup> sending staff or directors to a related company, and engaging in cross-shareholding.

Corporations maintain relations by giving gifts semi-annually to executives, managers, or employees of related companies.<sup>119</sup> Gifts are not intended as bribes but rather as an expression of hope that the donor will maintain its status in the fellow circle.<sup>120</sup> Frequently, corporations foster business relationships by offering executives, managers, and employees of related companies entertainment on special occasions. Although the ethics of this custom have been questioned in some cultures, the Japanese business community considers it to be an important form of marketing.<sup>121</sup> In many industries, such as cosmetics, pharmaceuticals, and publications, retailers are allowed to return un-

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115. ABE HITOSHI ET AL., *GENDAI NIHON NO SEIJI* [POLITICS OF MODERN JAPAN] 98 (1990).

116. See KESTER, *supra* note 106.

117. See Befu, *supra* note 97.

118. Yoshiro Miwa explained that this practice is not only fair but also rational when the following conditions are met: (1) the size of retailers is small, (2) the number of suppliers is large, (3) the amount of products supplied is large, (4) when displaying products, retailers can encourage consumers to buy them, and (5) when the marginal cost of manufacturing a product is far cheaper than the sales price of the product. For example, a product (or distribution system) that meets these conditions is cosmetics (or *keiretsu* of cosmetics distribution). See NIHON NO RYUTSU [THE JAPANESE DISTRIBUTION SYSTEM] 19-24 (Miwa Yoshiro & Nishimura Kiyohiko eds., 1991); MIWA YOSHIRO, NIHON NO TORIHIKI KANKO [JAPANESE BUSINESS PRACTICES] 32-41 (1991).

119. See MIWA, *supra* note 118, at 32.

120. *Id.*

121. See, e.g., WILLIAM H. SHAW, *BUSINESS ETHICS* 268-69 (1991).

sold products to wholesalers or producers. If the wholesalers or producers refuse to accept residuals, the retailers will leave the fellow circle. Producers view their relationship with retailers as critical—so much so that they are often willing to incur losses on unsold goods.<sup>122</sup>

Among all fellow circle business practices, cross-shareholding is one of the most important.<sup>123</sup> Once a company accepts a “related” corporation as a business partner, it is often given corporate shares. Holding the shares of a related corporation promotes a business consortium. This practice is found not only in vertical and horizontal *keiretsu*, but also in small and medium-sized firms throughout Japan.<sup>124</sup> Attempts by outsiders to adversely affect cross-shareholding relationships are most often thwarted by consortium-member corporations.<sup>125</sup> Interestingly, a recent JFTC survey shows that between 1981 and 1988 the ratio of cross-shareholding declined from 25.48 percent to 21.61 percent.<sup>126</sup>

### C. *Triangular Relations*

Administrative guidance is perhaps the single most significant institutional practice in the political community.<sup>127</sup> AG has been supported by the “triangular” relations or triumvirate among top business leaders, politicians, and elite bureaucrats.<sup>128</sup> As we shall see below, its

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122. See Tetsu Kobayashi, *The Effect of the Practice of Returned Unsold Goods in Japan on Entry into the Japanese Market*, 4 OSAKA CITY U. BUS. REV. 23 (1993) (noting that the JFTC does not regard the return of goods as violative of the Antimonopoly Act [AMA]).

123. See Paul Sheard, *Interlocking Shareholdings and Corporate Governance*, in *THE JAPANESE FIRM: SOURCES OF COMPETITIVE STRENGTH* (Masahiko Aoki & Ronald Dore eds., 1994). Cross-shareholding has been called the “glue that binds horizontal *keiretsu*.” Yoshinari, *supra* note 111, at 198.

124. See Michael Gerlach, *Keiretsu Organization in the Japanese Economy: Analysis and Trade Implications*, in *POLITICS AND PRODUCTIVITY: HOW JAPAN'S DEVELOPMENT STRATEGY WORKS* 141 (Chalmers Johnson et al. eds., 1989); ABEGGLEN & STALK, *supra* note 77.

125. See KESTER, *supra* note 106, at 258-59.

126. THE JAPAN FAIR TRADE COMMISSION, KIGYOKAN TORIHIKI NO JITTAI NI KAN SURU CHOSA [RESEARCH ON CORPORATE TRANSACTIONS] 15 (1991).

127. See Takashi Wakiyama, *The Nature and Tools of Japan's Industrial Policy*, 27 HARV. INT'L L.J. 467 (1986).

128. The traditional triumvirate has changed following the recent elections. New political parties have developed powerful constituencies (e.g., New Frontier Party), and established parties (the Liberal Democratic Party [LDP] and Socialist Party) have joined together to form the present cabinet. Japan is in the process of reshaping its political structure. This movement already has affected the traditional triumvirate. It will probably give birth to a new triumvirate that will ensure the continued commitment to long-term reciprocity.

structure has been clearly supported by the normative constraint of concentric circles.

### 1. *Triumvirate*

To fully appreciate the importance of the triumvirate, it is necessary to recognize the symbiotic relations among business, politicians, and government. Consider, for example, that influential business organizations often include the Japanese bureaucracy (e.g., MITI and the Ministry of Finance) and politicians—mainly Liberal Democratic Party (LDP) members—in its fellow circle.<sup>129</sup> Additionally, business leaders routinely contribute large sums to campaign funds to procure a balance of favors.<sup>130</sup> Corporations have provided donations to the most powerful political party, formerly the LDP, through economic federations (e.g., *Keidanren*, *Nikkeiren*, *Nissho*, *Doyukai*, etc.) and industrial organizations (e.g., Japanese Automobile Association, Life Insurance Association, Japanese Construction Industry Federation, and Petroleum Association). Corporations also purchase the party tickets.<sup>131</sup> Along with such donations, business leaders often endorse politicians by publicly declaring their support.<sup>132</sup>

129. For example, Mitsubishi bank not only has 28 Mitsubishi group companies (Friday Meeting members) such as Mitsubishi Trust Bank, Meiji Insurance, Mitsubishi Heavy Industry, Mitsubishi Motor, and Mitsubishi Trading, but also has so-called *zoku* politicians who are familiar with the banking business as well as the Banking Bureau of the Ministry of Finance.

130. See Sone Yashunori, *Interest Groups and the Process of Political Decision-Making in Japan*, in *CONSTRUCTS FOR UNDERSTANDING JAPAN* 259-95 (Yoshio Sugimoto & Ross E. Mouer eds., 1989).

131. The Japanese Political Donation Law set a limit on the amount that each political organization could receive. In response, politicians increased the number of such organizations and began to sell more of their "party tickets" to raise money.

132. In 1986, the LDP received about ¥7.8 billion (70% of total donations) from corporations and industrial organizations. TSUJINAKA YUTAKA, *RIEKI SHUDAN* [INTEREST GROUP] 129-32 (3d ed. 1991). The revenues (in millions of yen) of each faction of the LDP in 1990 and 1991 were as follows:

NAME OF FACTION	1990	1991
Takeshita	893	810
Mitsuzuka (Abe)	2,579	1,463
Miyazawa	983	1,268
Watanabe	1,728	1,878
Komoto	1,502	784
Kato	380	290

Although the Takeshita faction's revenue decreased in 1991, the reserve carried forward reached over 2 billion yen. This reserve was much larger than any other LDP faction. *Seiji*

Relations with bureaucrats add additional strength to the triumvirate. Private corporations, for example, offer jobs to bureaucrats upon retirement. Many retired bureaucrats accept positions in the firms that they once supervised, a practice known as *amakudari*, or "descending from heaven."<sup>133</sup> Relations are kept close through disclosure requirements. Corporate officials are often asked to voluntarily disclose information regarding their company to a bureau or ministry. Prompt and honest disclosures foster a spirit of cooperation and reciprocity.<sup>134</sup> Most significantly, governmental ministries, bureaus, and departments depend on the survival and development of the industries that they regulate.<sup>135</sup> A truly reciprocal relationship develops with ministries acting on behalf of the industry in return for the industry's allegiance and guidance. Over time, each action or inaction is noted, balanced, and counterbalanced.

Politicians have their own fellow circle that includes both business leaders and bureaucrats. They attend to requests from corporations and industries. In the past, politicians have revised laws that adversely affected corporate interests, suggested names of business leaders to bureaucrats to become members of a *shingikai* (deliberative council), encouraged administrative agencies to give approval to start or expand businesses, and facilitated administrative procedures. Relations between politicians and bureaucrats are also reciprocal. Even though politicians possess formal authority, they tend to enact statutes and pass bills drafted by the bureaucrats with little or no revision.<sup>136</sup> Politicians are known to promote elite bureaucrats to administrative posts, and retired bureaucrats frequently become politicians.

The bureaucracy has a fellow circle that in many ways resembles the relations found between business leaders and politicians. Included in the circle are both the politicians and leaders of business corporations. The bureaucracy responds to requests by politicians to recon-

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*Shikin, Saiko no 1857 Oku Yen [Political Fund Reaches the Highest: 185.7 Billion Yen]*, NIHON KEIZAI SHINBUN, Sept. 11, 1992, at 1. On December 18, 1992, the Takeshita faction was separated into two factions: the Obuchi group (Takeshita faction) and the Hada/Ozawa faction. 'Hada/Ozawa Ha' kyo Hossoku [*'Hada/Ozawa Faction' Inaugurated Today*], NIHON KEIZAI SHINBUN, Dec. 18, 1992, at 2.

133. 15% of the foreign corporations and foreign interest groups in Japan send their members to *shingikai* (deliberative council) (68% in the case of the Japanese). Approximately 30% of them have accepted *amakudari* (19% in the case of the Japanese). See TSUJINAKA, *supra* note 132, at 196-97.

134. KYOGOKU, *supra* note 78, at 70-71.

135. TSUJINAKA, *supra* note 132, at 143-44.

136. From the 1st Diet (1947) to the 112th Diet (1988), 68% of all the proposed bills were introduced by the Cabinet (bureaucrats). ABE ET AL., *supra* note 115, at 20-23.

sider administrative decisions that are adverse to their constituents' interests. Often, bureaucrats will be asked to facilitate administrative procedures that would benefit constituents who have previously provided campaign support. For example, bureaucrats are likely to satisfy requests from politicians to issue certifications, registrations, or permissions to private companies. Even if the bureaucrats have already denied a prior corporate request, influential politicians may have that request reviewed again and granted to protect their honor. There is a significant interest in maintaining a balance between favors and debts.

Ministries such as MITI have used their authority to foster industrial growth in order to provide assistance to business leaders.<sup>137</sup> In the 1950s, MITI protected strategic industries by regulating the influx of foreign capital and setting non-tariff barriers such as import restrictions.<sup>138</sup> In 1953, the Antimonopoly Act (AMA) was revised, allowing a temporary cartel designed to streamline industries and counter an economic recession. This revision of the AMA was made after a formal request by *Keidanren* and in response to public opinion favoring a reconstruction of the economy.<sup>139</sup>

In the 1960s, facing the age of capital liberalization (1967-73), MITI tried to restructure the steel, automobile, machine, and electronics industries to ensure their international competitiveness. During this decade, many large-scale mergers (e.g., three Mitsubishi corporations, Nissan and Prince Motors, and Yawata and Fuji Steels) were allowed.<sup>140</sup> In the late 1960s, in response to the expectations of industrial leaders, MITI supported computer research and development. Governmental priority gradually shifted from heavy industries

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137. This is not to suggest that MITI's intervention has brought consistent success to the Japanese industries. On the contrary, as Tsuruta has noted, MITI has made many strategic errors in industrial policies. See TSURUTA TOSHIMASA, *SENGO NIHON NO SANGYO SEISAKU* [INDUSTRIAL POLICIES OF POST-WAR JAPAN] 191-98 (1982). A recent example is the "fifth-generation computer project." After spending more than \$400 million, the Japanese government decided to give away the software developed by the project.

138. The Japanese Antimonopoly Act (AMA) was enacted in 1947. Because of the support of the Allied Occupation Force, from 1947 to 1952, the Law was rigorously enforced against Japanese corporations. In 1953, however, the Law was revised to favor corporations. Mitsuo Matsushita, *The Antimonopoly Law of Japan*, 11 L. JAPAN 57 (1978).

139. See, e.g., TSURUTA, *supra* note 137, at 32-50, 58-81. The amendment resulted in the elimination of the provision that regarded cartels as illegal. In its place, other provisions were introduced that allowed for exemptions and resale price maintenance. See Matsushita, *supra* note 138, at 57.

140. TSURUTA, *supra* note 137, at 82-96, 115-30. Matsushita, *supra* note 138.

to high-technology industries.<sup>141</sup> In the 1970s, many industries formed "recession cartels," due in part to the first oil crisis of 1973, that were largely supported by MITI. In addition, the legislature enacted the Structurally Depressed Industries Law to rescue declining industries by encouraging corporations to dismantle unprofitable facilities.<sup>142</sup> Although the role of the bureaucracy has changed, especially in the 1980s and early 1990s,<sup>143</sup> its main function has been to foster growth of Japanese industries through preferential treatment (e.g., tax reduction, subsidy, and deregulation), and to reduce friction among special interest groups.<sup>144</sup> Unlike most other regulatory environments, bureaucrats in Japan allow, and often encourage, the private sector to participate in the external policy-making process so that a consensus can be reached among stakeholders and interest groups.<sup>145</sup> The bureaucracy exists for the benefit of Japanese industries.<sup>146</sup>

#### D. Dynamics of Concentric Circles

As noted earlier, concentric circles serve at least two social-control functions: proactive and reactive. Proactive control provides insulation against normative deviation. Reactive control responds to

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141. See Shinjo, K., *Computer Sangyo [Computer Industry] in NIHON NO SANGYO SEISAKU [INDUSTRIAL POLICY IN JAPAN]* 305-16 (Ryutaro Komiya et al. eds., 1984).

142. Tsuruta, *supra* note 137, at 224-25, 251-58.

143. In the late 1980s, the government first opened research and development opportunities to foreign corporations. For example, MITI approved Du Pont's request to participate in one of MITI's projects. This project, in which 46 Japanese corporations have participated (such as NEC, Hitachi, and Sumitomo Electronic Industries), is designing next-generation superconducting materials. *Chodendo Center no Kerkyu Kaihatsu, DuPont Sanka e [R&D of the Superconducting Center: DuPont Will Participate]*, NIHON KEIZAI SHINBUN, Oct. 5, 1992, at 1.

144. See, e.g., *Isuzu/Honda Teikei no Shogeki [Shock of Isuzu-Honda Coalition]*, NIHON KEIZAI SHINBUN, Dec. 21, 1992, at 11. The European and Japanese automobile markets differ significantly. British Leyland has about 40% of the British market share, Renault and Peugeot control almost all of the French market, and Fiat has approximately 80% of the Italian market. The same goes for steel, computers, and petrochemicals. HIWATARI NOBUHIRO, SENGU NIHON NO SHUO TO SEIJI [MARKET AND POLITICS OF POSTWAR JAPAN], 14-19 (1991).

145. See Yashunori, *supra* note 130, at 259-95.

146. The integrity of triangular relations is put to the test with diverse corporate, bureaucratic, and political interests. The Japanese political community, for example, may be found not only in the common area of the three fellow circles but also in a variety of other interest groups. The functional division of ministries according to industry also has the unfortunate consequence of creating conflict among ministries, agencies, and bureaus. The triangular relationship is further constrained by both the Japan circle and world circle. Finally, the triangular structure has faced a new challenge: The formation of research and advisory councils, such as the *shingikai*, the *chosakai* (research council), and the *shiteki shimon kikan* (private advisory body of the Prime Minister or Ministers).

deviance that has surfaced. In Japan, the framework of concentric circles generally serves a proactive function. The formal and informal social hierarchies, discussed below, most often provide a reactive control.<sup>147</sup> How do concentric circles exert social control over agents? The framework influences agents in two ways: by encouraging them to abide by normative rules and customs, and by deterring them from engaging in normative deviance. Deterrence is closely related to the proactive function of social control—a function that may be seen in Professor Kyogoku's notion of an "operation base and battlefield."<sup>148</sup>

### 1. Proactive Function—Operation Base and Battlefield

Each concentric circle has elements of a battlefield and operation base. Individuals and corporations are likely to regard their outer circle as a battlefield and inner circle as an operation base.<sup>149</sup> Individuals or corporations expect the family and fellow circles to assume the role of an operation base. When the Japan circle is observed from the vantage point of the world perspective, Japan itself is also considered an operation base. These multi-layered inner circles may be conceptualized as multiple operation bases. Japanese think of the inner circle as a place to gain strength for the next battle and develop strategies for increasingly turbulent environments.<sup>150</sup> The configuration of bat-

147. See DONALD BLACK, *THE BEHAVIOR OF LAW* (1976); HORWITZ, *supra* note 33.

148. The concepts of "battlefield" and "operation base" are adapted from Kyogoku. KYOGOKU, *supra* note 78, at 191-204. This dichotomy is similar to that of "*soto*" (outside) and "*uchi*" (inside). NAKANE, *supra* note 81, at 47-54. Takeo Doi explained this dichotomy in terms of "reserved attitudes." Just as the operation base is multi-layered, so is *uchi*. In the most intimate *uchi*, the family circle, any reservation of attitudes is not required, because of *amae* (benevolence by parents to accept behavior of their children and excessive dependence by the children on their parents). See Doi, *supra* note 78, at 38-43.

149. For example, when the fellow circle is recognized as a battlefield, the family circle takes the role of an operation base. When there is significant competition among the members of the fellow circle, individuals look for peace of mind in the family circle.

150. KYOGOKU, *supra* note 78, at 218. This principle of free competition is justified by the Japanese work ethic. Many Japanese believe that work is one of the most important "ways" or "paths" to reach something sacred or the ultimate reality. This belief can be found most clearly in the Buddhism of Shosan Suzuki (1579-1620) or the Confucianism of Baigan Ishida (1685-1744). According to Suzuki, all people, whether peasants, merchants, priests, or warriors, can enter Nirvana if they concentrate on their own calling with sincerity and faithfulness. SUZUKI SHOSAN, *SUZUKI SHOSAN DOJIN ZENSHU* [THE COMPLETE WORKS OF PRIEST SHOSAN SUZUKI] 61-72 (1962). Ishida also believed that commerce can unify individual 'microcosm' with ultimate 'macrocosm.' Whatever work people do, if they work honestly and earnestly, their work becomes an ideal way to fulfill their potentials. 1 ISHIDA BAIGAN, *ISHIDA BAIGAN ZENSHU* [THE COMPLETE WORKS OF BAIGAN ISHIDA] (1956); YAMAMOTO SHICHIHEI, *NIHON SHIHONSHUGI NO SEISHIN* [SPIRIT OF THE JAPANESE CAPITALISM] 125-31, 142-56 (1979).



tlefields is similar. The world circle is perceived to be a battlefield for the Japan, fellow, and family circles. The Japan circle is also considered to be a battlefield for the fellow and family circles. Implicit or explicit competition among brothers, friends, and colleagues suggests that the family and fellow circles also can be battlefields. These multi-layered inner circles are "multiple battlefields."

Agents strive to achieve wealth, power, market share, competitive advantage, and other indicia of success in these battlefields. Achievements and advancements result in tangible recognition within the inner circles. This recognition for achievement and advancement serves as a strong reinforcement for pro-social action. It fosters commitment and investment in conventional activities and allegiance to common values.

## 2. *Proactive Function - Deterrence*

The inner circle's role in deterring normative violation may be traced to concerns over damage to both personal and group reputation.<sup>151</sup> Thus, if agents in the outer circles are accused of wrongdoing, both their reputation and the groups to which they belong may be damaged. Where reputational damage is significant, agents risk losing their operation bases (e.g., the fellow circle). Individuals are deterred from normative and law violation for fear that their actions might be publicly exposed.<sup>152</sup> Once misconduct is revealed, an individual faces inevitable shame and dishonor. An individual's wrongdoing also tarnishes the name of his corporation.<sup>153</sup> If the misconduct damages a corporate image or reputation, forced retirement or resignation is likely to follow.

Corporations are similarly reluctant to violate laws and norms. A corporation fears public exposure of illegal loans, bribery, political fraud, consumer fraud, insider-trading, defective products, and environmental violations.<sup>154</sup> Once disclosed, the corporation and its industrial group face dishonor. With serious normative violations, other corporations in the fellow circle might encourage or even force corpo-

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151. See JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989).

152. *Id.*

153. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 *LAW & SOC. REV.* 461 (Robert Kidder ed., 1986).

154. See Laufer & Cohen, *supra* note 113.

rate restructuring.<sup>155</sup> Executives who fail to take responsibility for their actions are ostracized from the corporation's fellow circle.

Throughout this part, we have focused our attention on concentric circles as disincentives for norm violation. This is its proactive function. Below we will consider its reactive function in the context of multiple social hierarchies and efforts to engage in mediation.<sup>156</sup>

### 3. *Reactive Function—Mediation*

The framework of concentric circles promotes harmony (*wa*) through the mediation and conciliation of conflicts.<sup>157</sup> The prognosis for successful mediation is determined by: (1) the presence of strong ties or bonds between conflicting parties, (2) the sharing of common normative constraints and cross-linkages, (3) the extent to which the parties are of equal status and have comparable power in a shared social hierarchy, and (4) the parties' commitment to long-term relationships.<sup>158</sup>

In concentric circles, long-standing relationships are formed in multiple social hierarchies that have a distinct internal organization and ranking.<sup>159</sup> All norm-violative actions are subjected to a host of constraints imposed by relationships in these hierarchies.<sup>160</sup>

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155. Individuals who engage in unethical or criminal behavior for the sake of the corporation are often allowed to remain in the circle without any formal authority. Consider, for example, the former president of All Nippon Airlines (ANA), Tokuji Wakasa, who resigned as president after his participation in the Lockheed Scandal. Wakasa has remained with ANA, even after his guilt was established, due to his popularity with ANA's rank-and-file. ANA, after changing its certificate of incorporation, appointed Wakasa to a new ceremonial post (honorary chairman). Wakasa remained in his fellow circle, losing only the formal power. *Zen Nikku 'Post Wakasa' ni Fuan [ANA Worries About Post Wakasa Regime]*, Nihon Keizai Shinbun, Sept. 19, 1992, at 10.

156. The "conciliatory model" proposed by Horwitz is very similar to this mediator-centered one, because in this model conflicts are not resolved through the imposition of sanctions; rather, they are resolved through mutual bargaining between disputing parties with the assistance of a mediator. HORWITZ, *supra* note 33, at 65.

157. See CONFLICT IN JAPAN (Ellis S. Krauss et al. eds., 1983); Susan J. Pharr, *Resolving Social Conflicts: a Comparative View of Interpersonal and Inter-group Relations in Japan*, in CONSTRUCTS FOR UNDERSTANDING JAPAN 228-58 (Yoshio Sugimoto & Ross E. Mouer eds., 1989).

158. See HORWITZ, *supra* note 33, at 65-76.

159. See NAKANE, *supra* note 81, at 28-40. Nakane considers hierarchy as providing the fundamental structure and core of vertical organizations. See also HENDRY, *supra* note 89, at 70 ("Hierarchical ranking runs through Japanese life, ordering individuals, groups, institutions, material objects, even foods, but at any particular level there will be a certain equality as well.").

160. See, e.g., *supra* note 157.

a. *Social Hierarchy*

The contribution of a social hierarchy to conflict resolution (social control) is determined by the hierarchy's convergence. Agents generally perceive interest groups in the fellow circle to be arranged in a hierarchical fashion. For example, the hierarchy governing Japanese business consists of business federations, industrial organizations, corporate groups, leading corporations, medium-sized companies, and small businesses.<sup>161</sup> Even within a corporation, employees are distributed vertically within the corporate hierarchy.<sup>162</sup> The bureaucracy and political parties also have distinct hierarchical structures.<sup>163</sup> Politicians view their political fellows as hierarchically ordered groups, including interest groups, leaders of political factions, Diet members, governors, mayors, and village headmen.<sup>164</sup>

Conflict resolution is practiced in social hierarchies that have distinct rankings.<sup>165</sup> Thus, if employees fail to resolve a conflict, they may ask a supervisor to mediate their interests. If there is no resolution, then the workers may turn to a mid-level manager. If the manager is unsuccessful, then senior management may intervene. In some extreme cases, the Ministry of Labor might be urged to take action. A similar process takes place when there are conflicts within local communities. Here, a voluntary caretaker often determines the primacy and priority of interests. If the caretaker cannot mediate, for whatever reason, a local politician may be asked to settle the dispute. Finally, a leader of a political faction might try to resolve the conflict.<sup>166</sup>

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161. See NAKANE, *supra* note 81, at 28-40.

162. *Id.*

163. See SMITH, *supra* note 99.

164. A comparable hierarchy is found where parties share similar backgrounds (e.g., membership in the same community, corporate group, industry, or bureau of the government). For example, three employees who belong to different companies in the same vertical *keiretsu* may appear in the same or similar hierarchical ordering. Westermann and Burfeind describe hierarchy as one of the core characteristics of Japan. TED D. WESTERMANN & JAMES W. BURFEIND, *CRIME AND JUSTICE IN TWO SOCIETIES: JAPAN AND THE UNITED STATES* 22, 23 (1991). Yet, the stratification is not based on class but on institutions that become the focal point of status distinctions. According to Nakane, Japanese society sets a hierarchical order among people with the same qualifications in the same group (i.e., age, tenure, and education become important in the ranking processes). NAKANE, *supra* note 81, at 70.

165. See RODNEY CLARK, *THE JAPANESE COMPANY* (1979).

166. See generally HENDRY, *supra* note 89.

*b. Overlapped Hierarchy*

In Japan, virtually all hierarchies are connected in some way.<sup>167</sup> Because interest groups in a fellow circle often constitute part of other fellow circles, the hierarchy of each fellow circle is likely to share constituencies. Therefore, even if each disputant belongs to different hierarchies, members of the hierarchies most often have a significant and meaningful connection with one another. For example, an executive of a local company who belongs to the fellow circle of a nationwide corporation might be a member of the supporter association of a politician as well as a member of the *shingikai* organized by the bureaucracy. In such a case, the executive has multiple constituencies in a number of hierarchies. Corporate groups, and particularly vertical *keiretsu*, have their own hierarchies.<sup>168</sup>

Commentators, such as Professor Upham, have observed a bureaucratic informalism in Japan.<sup>169</sup> This informalism is underwritten by a consensus among citizens that bureaucratic intervention and informal coordination are necessary and meaningful. Informalism is accepted by government as well.<sup>170</sup> "The Japanese government," claims Upham, "has attempted to prevent the development of litigation into an effective and ongoing vehicle for social change."<sup>171</sup> Within the framework of concentric circles, any intervention is perceived as a natural response to the parties, expectations of the bureaucracy. Comparable intervention is found at almost every level of the Japanese society. Coordination and mediation may be found not only at the national level, but also in local communities, private enterprises, religious organizations, universities, sport clubs, families, and even among friends. Notably, mediation of conflict is entirely consensual. Even if the bureaucracy desired to engage in a coercive social control, it would be unsuccessful.<sup>172</sup> Consequently, the bureaucracy acts in a manner that is consistent with the interests of all stakeholders—one that produces the most harmonious resolution.<sup>173</sup>

167. See generally SMITH, *supra* note 99.

168. See THE JAPANESE FIRM (Masahiko Aoki & Ronald Dore eds., 1994). Private corporations or industries, in particular, view the government as occupying the highest position in the industrial hierarchies. The government is also perceived as an important interconnection among different hierarchies. TSURUTA, *supra* note 137.

169. UPHAM, *supra* note 17, at 166-204.

170. *Id.* at 166.

171. *Id.* at 18.

172. *Id.* at 17.

173. "Harmony" is of great importance for Japanese people. As Kyogoku has explained, after World War II when Japan learned of "democracy," ordinary Japanese viewed

### c. *Stable Hierarchy*

Tied to the notion of long-term reciprocity and the harmonious mediation of conflicts is a stable hierarchy (*i.e.*, a hierarchy that is not temporary or transitory).<sup>174</sup> Stability in hierarchies is visible in the political community, where, even after resigning from office, politicians remain influential, perhaps more so than when they held office.

In the business community, a comparable phenomenon exists. After formally retiring from their corporations, many presidents and directors continue to hold significant power.<sup>175</sup>

Organizational agents such as administrative agencies, bureaus, political factions, private companies, and corporate subdivisions also tend to maintain their social relations and exert influence over their agents. For example, if a newly elected Cabinet revises industrial strategies, MITI cannot radically change its traditional industrial policies because of its own long-standing relations with certain industries. Even after the top management of a corporation is reshuffled, corporate subdivisions most often find it difficult to alter their relations with other fellow companies. Perhaps most importantly, the existence of a stable hierarchy allows the mediator to establish a long-term balance among conflicting parties. Insofar as the mediator has played a role in prior mediations with the same parties, a proposal may be fashioned to appropriately consider the disputants' history. A long-standing institutional memory of each company, division, or office allows for equitable mediation.<sup>176</sup>

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democracy as "the principle of harmony" by which "everybody gets along well together." See KYOGOKU, *supra* note 78, at 281-84. As Egami explains: "Compared with Christian mythology, Japanese mythology is very different. In Christianity, the world is completely synthesized with an absolute God who stands at a central point where a standard of good and evil is made clear. On the contrary, in Japanese mythology, because *Amaterasu* and *Susanou* [Japanese ancient goddess and god] are opposing each other, [ancient literature] does not show any standard of good and evil at a central point. In Japanese mythology, opposition between good and evil balance each other. If we call the structure of Christian mythology a centrally unified type, then Japanese mythology may be called a *chuku kinko* [balanced-vacuum] type." *Nihon Minzoku to Nihon Bunka* [Japanese People and Culture] 430 (Egami, N. ed., 1989).

174. Consider the cases of Takuei Tanaka (the former Prime Minister) and Shin Kanemaru (the former Vice President of the LDP). Although both lost formal power, they could still affect the decision-making processes of the LDP and the Japanese government, simply because they once ruled their own political faction. Even after resigning, political leaders can use their relationships and political networks. This is true, to a certain degree, with most roles within Japanese society. YAMAMOTO SHICHIHEI, *HABATSU NO KENKYU* [A STUDY OF FACTION] 259-66 (1989).

175. See, e.g., H. PAUL VARLEY, *JAPANESE CULTURE* (3d ed. 1984).

176. See UPHAM, *supra* note 17, at 204.

#### IV. REGULATORY COMPLIANCE, CONCENTRIC CIRCLES, AND ESCs

In Part III, we concluded that the regulatory environment in Japan is characterized by strong proactive and reactive social controls; that concentric circles guide a complex system of normative constraints and influences; that the flexibility of AG reflects the informality and consensus-driven nature of industrial regulation in Japan; and that mediation in the context of hierarchies provides the basis for conflict resolution. We also noted that ESCs have been applied inconsistently, non-strategically, and with unnecessary formality. These observations and conclusions make it difficult, if not impossible, to expect lasting change from existing U.S.-initiated ESCs, no matter how well intentioned.

U.S. policy assumes that a greater reliance on formal controls is necessary to combat anticompetitive behavior. This assumption has been supported, implicitly or explicitly, in two ways. First, it has been argued that the availability and certainty of sanctions for failures to comply with existing laws will underwrite the effectiveness of informal law enforcement. Professor Haley, for example, has adopted Braithwaite's view that informal law enforcement or regulation in Japan is largely ineffective without the prospect of responsive sanctions.<sup>177</sup> Second, an increasing reliance on formal sanctions is justified by adopting a normative conceptualization championed by Comte, Durkheim, and Cooley at the turn of the twentieth century.<sup>178</sup> According to this view, the need for more formal social control is required by societal relations that become increasingly complex. As society evolves and personal or intimate relations are replaced by impersonal, contractual relations, there is a burgeoning of self-interest. As Ross noted, the "natural bonds, that were so many and firm when the rural neighborhood or village community was the type of aggregation, no longer bind men as they must be bound in the huge and complex aggregates of the day."<sup>179</sup>

With such development, Ross maintains that instinctive and informal social controls, like empathy, sociability, a sense of equity, and solidarity, become insufficient to control and curb self-interest. Thus,

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177. See Haley, *supra* note 9, at 114.

178. See C.H. COOLEY, *SOCIAL ORGANIZATION* (1909); WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* (1906); A. B. Hollingshead, *The Concept of Social Control*, 6 *AM. SOC. REV.* 217-24 (1941).

179. E.A. ROSS, *SOCIAL CONTROL* 433 (1901).

as natural communities mature into artificial societies, the regulation of conduct to quell temptation and resist succumbing to unethical opportunities demands a means of control that is more formal and systematic. Quite simply, with societal institutions requiring complex economic transactions and producing an amalgam of private interests, an artificial order is required to offset the increasing weakness of the natural order.

Both of these arguments are unpersuasive. The effectiveness of proactive and reactive constraints in Japan, discussed in Part III, do not hinge on the availability and certainty of law enforcement. Social control emerges from a host of relationships, interactions, practices, and policies that reflect, but are not determined by, the presence of law and vigilant law enforcement. There is little doubt that the effectiveness of consensual governance would be compromised, in time, by strict adherence to formal controls and procedures.<sup>180</sup> The normative view that an artificial order, derived from formal social control, is necessary to offset weakening informal controls is also inconsistent with the persuasive influence and authority of concentric circles. Below we argue that the preferred solution to antitrust and anticompetitive behavior will not be found through increased reliance on law or initiatives that are designed to cause such reliance. Rather, such behavior should be addressed with extraterritorial initiatives that serve to strengthen the proactive and reactive controls of Japan's informal regulatory environment.

#### *A. ESCs and Concentric Circles*

Extraterritorial initiatives designed to increase reliance on law and law enforcement and diminish reliance on administrative guidance underestimate the place of normative consensus and cooperation in concentric circles. Further, the use of ESCs fails to acknowledge the reliance of Japan's regulatory culture on a host of normative relationships that underwrite the family, quasi-family, fellow, Japan, and world circles. From basic familial relations to administrative guidance and the formation of cooperative industrial associations, cognitive and institutional norms are grounded in alliances that promote powerful social controls. The force of these alliances, and the strength of social control are maintained by reciprocal relationships and exchanges that encourage consensus building, cooperation, and mediation (see Table 3).

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180. See, e.g., Spaeth, *supra* note 18.

**Table 3**  
**Concentric Circles as Social Control**

	PROACTIVE SOCIAL CONTROL	REACTIVE SOCIAL CONTROL
COGNITIVE NORMS	Commitment to long-term reciprocity; sense of common identity and cultural background; subordination of interests; strong pressure to balance debts.	
CLOSE BUSINESS RELATIONSHIPS AND PRACTICES	Desire for inclusion within circle; maintenance of corporate relations through gifts and entertainment; encouraging the formation of cooperative associations; coalition building; cross-shareholding as evidence of trust and loyalty; building of long-term business relationships.	
TRIANGULAR RELATIONSHIPS	Interrelations between business, politicians, and government; reciprocity in relations; granting of favors; calculation of debts and credits; strong efforts by triumvirate to foster industrial growth.	
OPERATION BASE AND BATTLEFIELD	Common goal of achieving wealth, power, and advantage; desire for recognition; fostering commitment and allegiance to common values.	
DETERRENCE	Concerns over loss of reputation, employment, and status; powerful pressure of conformity.	
MEDIATION IN SOCIAL HIERARCHIES	—	Conciliatory control; mutual bargaining to an agreeable outcome in the context of a social hierarchy; influence and constraint of hierarchy on disputes; harmonious mediation within hierarchy.

### *B. The Effectiveness and Wisdom of ESCs*

Given these strong normative constraints, the objectives of ESCs should be revised and the initiatives redirected. Instead of threatening legal action and economic sanctions to promote reliance on law, extraterritorial initiatives should use the power and authority of ex-



isting proactive social controls in Japan to promote aggressive corporate, as well as industry, self-regulation and compliance.<sup>181</sup> Specifically, ESCs should require constructive action from four constituent groups: corporations, industrial associations, ministries, and new organizations designed to promote regulatory compliance. For example, antitrust compliance manuals should be compiled by corporations from all sectors, from manufacturers to retailers and service firms. Corporations should provide employee education programs on antitrust compliance.<sup>182</sup> Industrial associations should follow the lead of the Federation of Economic Organizations (*Keidanren*) and Federation of Bankers Association in drafting general and sector antitrust compliance guidelines. In addition, model compliance programs should be developed.<sup>183</sup> Next, government ministries, such as MITI and JFTC, should use the leverage that inheres in business-government relations to urge corporate compliance. The strength of regulatory policy will be determined by the legitimacy given to existing antitrust law by government agencies. The prognosis for reform therefore turns on the way in which antitrust regulation is framed by the bureaucracy. Agencies must stress the importance of antitrust policy in bureaucratic interactions. Voluntary compliance by corporations is a product of negotiation and compromise. Ministries should take a proactive role in preparing guidelines and compliance manuals, sponsoring in-house seminars, and maintaining active antitrust oversight committees.<sup>184</sup> In addition, ministries should conduct inter-min-

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181. This effort is different from the use of hierarchically escalating sanctions to encourage self regulation. See *supra* notes 11-27 and accompanying text.

182. *Most Firms Trying to Observe Antimonopoly Law*, Japan Economic Newswire, Apr. 24, 1992, available in LEXIS, World Library, Jen File (In a survey of 625 companies, 30% had already started to draft compliance manuals and 50% planned on doing so in the future); *Bankers Feel the Heat of Fair-Trade Law; Employees Instructed in How to Comply with Antitrust Statutes*, NIKKEI WKLY, Oct. 26, 1992, available in LEXIS, World Library, Nikkei File.

183. See, e.g., *Japanese Trust Banking Sector Adopts Antimonopoly Act Compliance Guidelines*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1616, at 656 (May 27, 1993); *Large Japanese Banks Take Steps to Adopt Antitrust Compliance Programs*, 63 Antitrust & Trade Reg. Rep. (BNA) No. 1583, at 402 (Sept. 24, 1992); *Japanese Banking Group Develops Draft Antitrust Compliance Program*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1562, at 551 (Apr. 23, 1992) ("[S]elf-regulatory rules cover . . . bank-to-bank meetings, lending, deposit-taking, fees, and securities.").

184. See, e.g., *The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices*, *supra* note 58. See also, *Japanese Ministry Urges Glass Makers to Revise Antitrust Compliance Programs*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1552, at 212 (Feb. 13, 1992); *Japan's Economic Planning Agency Urges Companies to Adopt Compliance Programs*, 63 Antitrust & Trade Reg. Rep. (BNA) No. 1577, at 182 (Aug. 6, 1992).

istry compliance training programs for procurement officials.<sup>185</sup> Finally, ministries should form organizations to promote antitrust compliance (e.g., the Construction Industry Fair Trade Promotion Organization).<sup>186</sup> Each of these initiatives has been attempted, in limited efforts, within a specific industry or by a single ministry. ESCs should prompt the widespread development of compliance manuals, adoption of compliance programs, and implementation of compliance education and training.

The rationale is not to use ESCs to advance a model of coregulation (i.e., industry-association-government self-regulation, where the responsibility for rule-making and enforcement rests with industry or industrial associations).<sup>187</sup> It is also not an attempt to advance the notion of enforced self-regulation, where regulated firms formulate their own rules and standards, monitor compliance, and sanction non-compliance.<sup>188</sup> Models of enforced self-regulation require public monitoring of compliance, reliance on public law enforcement and adjudication, as well as a strategy of escalating governmental interventions where noncompliance continues.<sup>189</sup> The rationale is much more modest. ESCs should target corporations, industrial associations, ministries, and compliance organizations to promote the efficient use of the proactive social control mechanisms found in concentric circles. ESCs that press regulated firms and industries to codify compliance standards, adopt compliance procedures, and provide compliance training, recognize the strong potential and unique character of Japan's consensus-based regulatory system. Using extraterritorial initiatives to strengthen the very relationships and alliances that underwrite the regulatory environment acknowledges the integrity, as well as the legitimacy, of the government's commitment to antitrust regulation. The persistent use of inconsistent rule-based ESCs, in contrast, will

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For a discussion of the activity of the Economic Planning Agency, see HAHN, *supra* note 6, at 115.

185. See *JFTC Will Give Compliance Training to Public Officials in Procurement* 66 Antitrust & Trade Reg. Rep. (BNA) No. 1646, at 32 (Jan. 13, 1994).

186. See *Japanese Construction Ministry Forms Organization to Promote Compliance* 63 Antitrust & Trade Reg. Rep. (BNA) No. 1584, at 432 (Oct. 1, 1992).

187. See PETER GRABOSKY & JOHN BRAITHWAITE, *OF MATTERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES* (1986); Alan C. Page, *Financial Services: The Self Regulatory Alternative*, in *REGULATION AND PUBLIC LAW* (Robert Baldwin & Christopher McCrudden eds., 1987); JOHN BRAITHWAITE, *TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY* (1985).

188. See AYRES & BRAITHWAITE, *supra* note 12, at 102-03.

189. *Id.*

likely result in a symbolic reliance on law, symbolic shifts in regulatory policies, and negligible increases in prosecutions.

### C. *Extraterritorial Promotion of Informal Versus Formal Law Enforcement*

Using ESCs to promote informal versus formal law enforcement will be seen by some as imprudent, if not naive.<sup>190</sup> After all, there is much agreement that with all of the advantages of AG and consensual regulation, the single most significant limitation is its "lack of ability to enforce its aim."<sup>191</sup> To some, its primary virtue—bargained-for discretionary regulation—is also its primary vice. This observation has led to the generally accepted conclusion that informal enforcement of regulatory policy is effective to the extent that it is supported by the possibility of definite sanctions.<sup>192</sup> Commentators, in turn, have suggested variations of responsive regulation or pyramid regulatory enforcement, where compliance is seen as a function of the capacity for regulatory escalation and the potency of sanctions.<sup>193</sup> We argue that this suggestion, and the conclusion on which it is based, underestimates deference to authority in Japan; the strong cultural preference for cooperation, consensus, and social guidance; and the fear of retaliatory bureaucratic regulation by corporations and industries where noncompliance continues.<sup>194</sup> Moreover, the effort to promote a responsive regulatory system in Japan disregards the following facts: (1) that both formal and informal law enforcement mechanisms offer distinct limitations in terms of compliance;<sup>195</sup> (2) that responsive regulation generally requires rule-based regulatory environments;<sup>196</sup> and (3)

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190. Cf. John O. Haley, *Introduction: Legal Versus Social Controls*, 71 L. JAPAN 1 (1984).

191. Takashi Wakiyama, *The Nature and Tools of Japan's Industrial Policy*, 27 HARV. INT'L L.J. 471 (1986).

192. See Haley, *supra* note 9; Young, *supra* note 20, at 950 ("Noncompliance with administrative guidance that a regulated party finds unpalatable occurs most commonly when the agency is either unwilling or unable to resort to its collateral enforcement powers.").

193. Haley, *supra* note 9.

194. See Hiroshi, *supra* note 24, at 71 ("Although compliance is technically voluntary, guidance often becomes compulsory because of the substantial power wielded by the administrative authorities behind it.").

195. See Mark Cohen, *The Role of Criminal Sanctions in Antitrust Enforcement*, 7 CONTEMP. POL. ISSUES 36 (1989).

196. See AYRES & BRAITHWAITE, *supra* note 12.

that promoting resort to formal law enforcement runs a risk of undermining the primacy and authority of existing informal controls.<sup>197</sup>

The most significant of all the concerns with promoting formal law enforcement is the risk that the value associated with administrative consultation, advice, persuasion, and pressure would diminish as compliance becomes a simple function of the capacity for regulatory escalation and formal sanction.<sup>198</sup> One must ask whether there is a definite risk that formal social controls (formal law enforcement), introduced to supplement consensual governance, would undermine informal controls. Theories of rational choice, applied by some commentators to prove the value of formal social controls, suggest that this risk is very real.<sup>199</sup>

Finally, it is worthwhile asking if it is wise to use ESCs as a vehicle to promote reliance on formal social controls in a country that is regulated almost entirely by informal controls.<sup>200</sup> Despite all of the criticism and professed weaknesses of consensual governance, few constructive proposals have been offered to strengthen existing informal controls without resort to law.

## V. CONCLUSION

On April 13, 1992, following a competition policy seminar in Tokyo sponsored by the JFTC, James F. Rill, Chief of the Antitrust Division of the Department of Justice, observed: "One central theme . . . is that there's a common commitment to effective competition policy in both nations. And central to the effective development of competition policy is strong enforcement of laws dealing with competition."<sup>201</sup> Rill's comments, made shortly after a Department of Justice policy decision that extended the reach of U.S. antitrust law to foreign busi-

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197. See FRED A ADLER, *NATIONS NOT OBSESSED WITH CRIME* (1983); WESTERMANN & BURFIEND, *supra* note 164.

198. Cf. Haley, *Luck, Law, Culture, and Trade*, *supra* note 8, at 416-17.

199. See Haley, *supra* note 9, at 113 ("Compliance with formal law enforcement involves a similar balancing of gains and costs by the respondents. In deciding whether to comply with an informal, nonbinding request by government officials, the respondent balances the advantages against the disadvantages.").

200. Robert J. Smith, *Lawyers, Litigiousness, and the Law in Japan*, 11 CORNELL F. 53 (1984) ("Contemporary Japan remains a place where the family, neighborhood, and work place yield formidable sanctions over the behavior of individuals. Loyalty, obedience, deference to authority, acquiescence, and group identity are powerful deterrents to misbehavior.").

201. *Government-Business Mission to Japan Focuses on Urging Anti-Cartel Enforcement*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1561, at 522 (Apr. 16, 1992).

ness conduct, reflects a widely-held view that Japan must increase its reliance on the criminal enforcement of antimonopoly law.

In this article, we have concluded that effective competition policy is most likely to be found in the informal nature of Japanese consensual regulation. ESCs should actively promote self-regulation, as well as industry compliance. The alliances and relationships that serve as a foundation for the socio-cultural environment in Japan will ensure the effectiveness of self-regulation and compliance. As long as the foundation of Japan's regulatory environment reflects a commitment to consensus, long-term reciprocity, mediation, and hierarchy, attempts by the U.S. to impose a rule-centered model of regulation, through inconsistent ESCs, will only result in an infrequent and symbolic reliance on law.